(1) SUPREME COURT, U.S.

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No. _____

In The

Supreme Court of the United States

THOMAS J. CAPANO,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Delaware

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

I. Under the Delaware death penalty statute, 11 *Del. C.* §4209, the punishment for First Degree Murder is either death, or life imprisonment without parole. However, a defendant is eligible to be sentenced to death only if at least one "statutory aggravating circumstance" is proved by the State beyond a reasonable doubt. The statute, however, delegates the final determination of the existence of any "statutory aggravating circumstances," and the sentence to be imposed – life imprisonment or death – to the trial judge and relegates the role of the jury to providing the judge with only an advisory opinion on those two questions. The question presented here is whether this statutory scheme for imposition of the death penalty violates the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as interpreted by the Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Included in this question is whether *Walton v. Arizona*, 497 U.S. 639 (1990) should be overruled in light of *Apprendi*. See, *Apprendi*, 530 U.S. at 522-523 (Thomas, J. concurring) (whether *Apprendi* has overruled *Walton* "is a question for another day").

2. In *Beck v. Alabama*, 447 U.S. 625 (1980), the Court held that in a capital case, a state court's refusal to give the jury the "third option" of convicting the defendant on a lesser included offense may violate the Fourteenth Amendment's Due Process Clause. The Delaware Supreme Court acknowledged that the evidence in the case was sufficient to create reasonable doubt that the

CAPITAL CASE
QUESTIONS PRESENTED – Continued

defendant acted "intentionally" and was therefore guilty of capital murder, but held that such evidence did not entitle Petitioner to "lesser included offense" instructions, unless there was also evidence of a less culpable state of mind, i.e., that the defendant acted either "recklessly" or with "criminal negligence." The question presented here is whether such "reasonable doubt" evidence satisfies *Beck*'s "basis in the evidence" requirement. Also presented is the subsidiary question whether the requirement imposed by the Delaware Supreme Court that a defendant must present evidence to negate the "state of mind" alleged by the State, in order to have the jury instructed on lesser included offenses, unconstitutionally shifts the burden of proving the defendant's state of mind to the defendant. See, *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows.

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(1) The Delaware Supreme Court's opinion affirming the Petitioner's conviction and death sentence is *Capano v. State of Delaware*, 2001 Del. LEXIS 349, Del. Supr., Nos. 110 and 149, 1999 (August 10, 2001) (*en banc*), which is unpublished (Appendix A).

(2) The Delaware Superior Court's Sentencing Decision is *State of Delaware v. Thomas J. Capano*, 1999 Del. Super. LEXIS 541, Del. Super., No. 9711006198, Lee, J., (March 16, 1999), which is unpublished (Appendix B).

(3) The Delaware Superior Court's decision denying defendant's motion to vacate his death sentence is *State of Delaware v. Thomas J. Capano*, 1999 Del. Super. LEXIS 324, Del. Super., No. 9711006198, Lee, J., (September 1, 1999), which is unpublished (Appendix C).

JURISDICTION

The date of the final decision on the merits in this case by the Supreme Court of Delaware was August 10, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

United States Constitution, Amendment XIV, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Delaware Code, Title 11, Section 636: The full text of this statute is set forth in Appendix D.

Delaware Code, Title 11, Section 4209: The full text of this statute is set forth in Appendix E.

STATEMENT OF THE CASE

1. Overview of the Case

The Petitioner, Thomas J. Capano ("Capano") was indicted on a single charge of capital First Degree Murder arising from the death of Anne Marie Fahey ("Fahey"). The "guilt phase" of Capano's trial commenced on October 6, 1998 and concluded on January 17, 1999 with a verdict of the jury that Capano was guilty of First Degree Murder. The case then proceeded to the "penalty hearing" phase, which lasted an additional five days. (Appendix A, p. A-3). In this case, the State alleged only one "statutory aggravating circumstance" – that "the murder was premeditated and the result of substantial planning." (Appendix B, p. B-8). In the penalty hearing, the jury voted 11 to 1 that the State had established the alleged statutory aggravating circumstance, and voted 10 to 2 that the aggravating circumstances outweighed the mitigating circumstances. (Appendix A, p. A-215). At sentencing, on March 16, 1999, the trial judge found that the State had established the existence of the above statutory aggravating circumstance beyond a reasonable doubt. (Appendix B, p. B-18). The trial judge also found that the aggravating circumstances outweighed the mitigating circumstances. The trial court therefore sentenced Capano to death. (Appendix B, pp. B-21-B-24). On August 10, 2001, Capano's conviction and death sentence were

affirmed by the Supreme Court of Delaware. (Appendix A). What follows in this subsection is a summary of the underlying facts which led to Capano's indictment and trial, including an overview of the State's theory of the case and the defense case. Additional facts necessary to the arguments relied on for allowance of the Writ are set forth in the Argument sections which follow. The final subsection specifies the stage of the proceedings in the state courts below where the federal questions sought to be reviewed were first raised. See, Supreme Court Rule 14.1(g)(i).

(a) The Parties

Anne Marie Fahey was the scheduling secretary for Delaware Governor Thomas Carper. She was last seen alive on Thursday, June 27, 1996, when she went to dinner with Capano in Philadelphia. Her family reported her missing on June 30, 1996. Capano was a prominent Delaware attorney and managing partner at the Wilmington office of a major Philadelphia based law firm. Capano was estranged from his wife and is the father of four daughters. Capano also has three brothers, Louis Capano, Jr., Gerard "Gerry" Capano and Joseph Capano, and one sister. In July 1996, the FBI and a federal grand jury in Delaware began a kidnaping investigation into Fahey's disappearance. On August 5, 1996, Capano was formally notified that he was a "target" of that investigation. (Appendix A, pp. A-11-A-12); See, *State v. Capano*, 1998 Del. Super. LEXIS, 377, *1-*2, Del. Super., Lee, J. (September 21, 1998).

Ultimately, two of Capano's brothers, Louis and Gerry, as well as Deborah McIntyre ("McIntyre"), a mistress of Thomas Capano, became ensnared in the investigation into Fahey's disappearance. In October 1997, Gerry's home was raided by federal agents, who found weapons and illegal drugs. In November 1997, Gerry and Louis entered into plea agreements with the federal government and agreed to cooperate with the investigation.

They both provided investigators with critical information that led to Capano's arrest and subsequent indictment. After Capano was charged with Fahey's murder, McIntyre likewise agreed to cooperate with the authorities in exchange for an agreement not to be charged with perjury. (Appendix A, p. A-12).

(b) The State's Theory of the Case

The State charged Capano with First Degree Murder even though Fahey's body was never found and even though the State was unable to establish how Fahey had died. (Appendix A, p. A-11; A-119-A-120). The Indictment alleged only that Capano had "intentionally caused the death of Anne Marie Fahey." See, 11 *Del.C.* §636(a)(1) (Appendix D). With no direct or physical evidence to support its allegation that Capano had intentionally caused Fahey's death, the State constructed a wholly circumstantial theory of the case, which rested on three broad categories of evidence: (a) evidence of an alleged "motive;" (b) evidence of an alleged "plan;" and, (c) evidence of "consciousness of guilt." (Appendix A, p. A-12).

Evidence of Motive

The State's "motive" evidence consisted entirely of hearsay statements Fahey recorded in her diary and those she allegedly made to her family, friends and psychotherapists. Fahey began dating Capano in March 1994. She kept this relationship, or at least its intimate nature, hidden from most of her friends and her family. Fahey also suffered from a serious eating disorder, for which she was being treated by several psychotherapists, from whom she also hid her relationship with Capano. In September 1995, Fahey was introduced to Michael Scanlan. Fahey's friends and family claimed, that after a rocky beginning, she fell in love with Scanlan. Although Capano knew about Fahey's eating disorder, and was actively trying to get her help, Fahey hid her disorder

from Scanlan. Fahey was also terribly afraid that Scanlan would learn of her relationship with Capano, a married man, and kept that affair a secret from him as well. The State's witnesses testified that, after Fahey began dating Scanlan, she attempted to break off her relationship with Capano, who became very upset and pursued her relentlessly. An entry in Fahey's diary dated April 7, 1996, which the State relied upon as a pivotal piece of evidence reflecting Fahey's feelings towards Capano during this period, Fahey wrote, "I have finally brought closure to Tom Capano . . . what a controlling, manipulative, insecure jealous maniac." (Appendix A, pp. A-12-A-13). According to the State's theory of the case, Capano's reaction to Fahey's attempts to end the romantic relationship was to plan her death.

Evidence of Planning and Premeditation

Because the State had no evidence that would even circumstantially establish Capano's state of mind on the night Fahey disappeared, it set out to prove that Capano had planned Fahey's murder well before that night. Here, the State's key witnesses were Capano's brother, Gerry Capano and Deborah McIntyre. According to Gerry, in February 1996, Thomas told his brothers, Gerry and Joseph, that he was being threatened by unidentified extortionists. Capano borrowed $8,000 from Gerry, which he repaid a few days later. Some time after that, Gerry gave Thomas a handgun, which was returned to Gerry by May of that year. (Appendix A, p. A-14). Gerry also testified that sometime between February and May 1996, Thomas asked Gerry if he could borrow his boat if he ever had to "do something" to the people who were extorting him. (Appendix A, p. A-53). McIntyre, who was Capano's mistress for some seventeen years, testified that in May 1996, Capano drove her to Miller's Gun Center where, at his request, she purchased a handgun while he waited outside in the car. According to McIntyre, she never saw the gun again. (Appendix A, pp. A-57-A-58). The State

also presented evidence that in April 1996, Capano had purchased a 162-quart marine cooler. In early 1996, Capano had also purchased a lock and a length of chain that he subsequently used to secure the cooler containing Fahey's body. A cooler just like the one purchased by Capano eventually was used to dispose of Fahey's body in the Atlantic Ocean. (Appendix A, p. A-14); (Appendix A, p. A-56).

Evidence of Consciousness of Guilt

This final category of evidence, which was largely undisputed by the defendant himself, related to steps taken by Capano to dispose of physical evidence that might link him to Fahey's disappearance. (Appendix A, pp. A-58-A-60). This evidence also included Gerry's testimony about the disposal of Fahey's body in the Atlantic Ocean on June 28, 1996, and removing a bloodstained loveseat and rug from Capano's house and placing it in a dumpster at a nearby construction site operated by his brother Louis. (Appendix A, pp. A-15-A-16). On June 29, 1996, Capano bought a new rug for his great room. Louis testified that, on June 30, 1996, Thomas told him that Fahey had slit her wrists at his home, staining the loveseat, but that she was okay. Thomas asked Louis to make sure that the dumpsters were emptied the next day because he had disposed of the loveseat and some of Fahey's personal belongings in the dumpster. In a search of Capano's house on July 31, 1996, investigators discovered small spots of blood on a wall in Capano's great room. The spots were compared with a sample of Fahey's blood by DNA testing and were found to be a likely match. (Appendix A, pp. A-16-A-17).

The Defense Case

The defense case was that Fahey's death was the result of an accidental shooting that had occurred in the great room of his house on June 27, 1996. According to Capano, who testified in his own defense at trial, after he

and Fahey left the Panorama Restaurant in Philadelphia, they decided to go to Capano's house to watch TV, arriving shortly after 10:00 p.m. Sometime after they arrived, with Fahey still at his house, Capano had a phone conversation with McIntyre, who frequently came to his house and would sometimes spend the night. Capano told McIntyre that she should not come over to his house that night. Sometime after the phone call, Capano and Fahey were seated on a love seat in Capano's great room when Capano heard a noise, looked up, and saw McIntyre standing in the kitchen. McIntyre appeared to be angry and yelled, "Who's this?" According to Capano, McIntyre was holding a gun at her side and was saying that she was going to kill herself. As McIntyre began to raise her left arm, which was holding the gun, Capano grabbed her arm and the gun went off, striking Fahey behind her right ear and killing her instantly. Capano testified that he and McIntyre attempted to perform CPR on Fahey and then realized she could not be saved. (Appendix A, pp. A-17-A-18); (Appendix A, p. A-123).

2. Stage of Proceedings Where Questions Presented for Review Were Raised

(a) Entitlement to Jury Instructions on Lesser Included Offenses

During the prayer conference held prior to closing arguments, the defense requested that the court instruct the jury on lesser included offenses to First Degree Murder. The defense asserted that United States Supreme Court decisions, which emphasized that the jury should not be forced to choose between the extremes of First Degree Murder and an outright acquittal, guaranteed Capano the right to instructions on lesser included offenses under the Due Process Clause. The defense also pointed out that the State's evidence that the killing was "intentional" was entirely circumstantial and argued that there was other evidence in the record which contradicted the State's theory of the case and from which a

rational juror would have a reasonable doubt that the killing was intentional. Finally, the defense noted, a rational juror could also conclude that Capano acted "recklessly" or with "criminal negligence" in reaching out for McIntyre's arm, which would support a verdict of Murder Second Degree, Manslaughter, or Criminally Negligent Homicide. (Appendix F, pp. F-5-F-11). The trial court denied the defense's request. The trial court noted that the State's theory, which equated evidence of prior planning and the subsequent coverup of Fahey's death with intent, produced "some evidence of intent, but there isn't any evidence of recklessness or negligence in this case." (Appendix F, pp. F-11-F-12). Accordingly, the trial court charged the jury only on the elements of murder first degree. The same contentions set forth above were renewed and rejected in Capano's direct appeal to the Delaware Supreme Court. (Appendix A, pp. A-124-127).

(b) Validity of Death Penalty Statute Under *Apprendi v. New Jersey*

The decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) was handed down while Capano's direct appeal was still pending in the Delaware Supreme Court. However, even prior to the *Apprendi* decision, the defense had filed a post-trial motion to vacate Capano's death sentence based on the jury's non-unanimous vote of 11 to 1 on the question whether the State had established the sole statutory aggravating circumstance that "the murder was premeditated and the result of substantial planning." That motion was denied by the trial Court. (Appendix C). After the *Apprendi* decision was handed down, Capano raised the claim, in his then pending appeal in the Delaware Supreme Court, that Delaware's death penalty statute, 11 *Del.C.* §4209 (Appendix E), was unconstitutional under *Apprendi*. That claim was rejected by the Delaware Supreme Court. (Appendix A, pp. A-209-A-215).

REASONS FOR GRANTING THE WRIT

I. DELAWARE'S STATUTORY SCHEME FOR THE IMPOSITION OF THE DEATH PENALTY FOLLOWING A CONVICTION FOR FIRST DEGREE MURDER VIOLATES THE SIXTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS INTERPRETED BY THIS COURT'S DECISION IN *APPRENDI v. NEW JERSEY*, 530 U.S. 466 (2000).

1. The Delaware Death Penalty Statute

The current version of Delaware's death penalty law, 11 *Del.C.* §4209 (Appendix E), was enacted on November 1, 1991. Under that statutory scheme, not all convictions of first-degree murder expose a defendant to a possible sentence of death. See, 11 *Del.C.* §636(b) ("Murder in the first degree . . . shall be punished as provided in §4209") (Appendix D).[1] In a case where the State does seek the death penalty and the defendant is convicted of First Degree Murder by a jury, the case proceeds to a penalty hearing. 11 *Del.C.* §4209(c). The penalty hearing itself is a two-step process in which the jury functions in an advisory capacity only. See, 11 *Del.C.* §4209(d) and (e); (Appendix A, p. A-177) ("Under Delaware law, the function of the jury in the penalty phase is solely advisory");[2] *Dawson v. State*, Del. Supr., 673 A.2d 1186, 1196, *cert. denied*, 519 U.S. 844 (1996) (jury recommendation on death penalty issues is merely an advisory verdict). In the penalty hearing, the advisory jury is asked to consider and

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[1] The possible punishments under §4209 are death by lethal injection or life imprisonment without possibility of parole.

[2] In characterizing the role of the penalty-phase jury in this very case, the Delaware Supreme Court noted, that, in reaching its advisory verdict, a jury is "require[d] to resolve **factual** disputes." (Appendix A, p. A-207 (emphasis added)).

vote on two questions: First, whether, "beyond a reasonable doubt,"[3] "the evidence shows . . . the existence of at least 1 [statutory] aggravating circumstance . . . "[4] Second, the jury considers whether, by a preponderance of the evidence, "the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist." See, 11 *Del.C.* §4209(c)(3)a. The jury then reports to the Court "its final vote by the number of affirmative votes and negative votes on each question." 11 *Del.C.* §4209(c)(3)b. The matter then reverts to the sentencing judge, who must also find the existence of a statutory aggravating circumstance, beyond a reasonable doubt, as a predicate to the imposition of a sentence of death. The sentencing judge, however, as noted above, is not required to accept the jury's advisory verdict. 11 *Del.C.* §4209(d) and (e). Finally, if a death sentence is imposed by the sentencing judge, the court "shall set forth in writing its findings upon which the sentence of death is based." 11 *Del.C.* §4209(d)(3). See, Appendix A, pp. A-215-216.

In this case, as previously noted, the only statutory aggravating circumstance alleged by the State was that "the murder was premeditated and the result of substantial planning." See, 11 *Del.C.* §4209(e)(1)(u) (Appendix B, p. B-8). The jury voted 11 to 1 that this statutory aggravating circumstance had been established beyond a reasonable doubt. (Appendix A, p. A-216). In sentencing Capano to death, the sentencing judge independently found that this statutory aggravating circumstance had been established beyond a reasonable doubt and also found that the aggravating circumstances outweighed the mitigating circumstances. (Appendix B, p. B-16-B-24).

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[3] Under Delaware law, the requirement of "proof beyond a reasonable doubt" means a unanimous verdict by a jury. See, *Claudio v. State*, Del. Supr., 585 A.2d 1278, 1296-1297 (1991).

[4] There are 22 statutory aggravating circumstances listed in the Delaware Criminal Code. 11 *Del.C.* §4209(e).

2. This Court's Decision in *Apprendi*

This case presents the question of whether the Sixth Amendment's right to a jury determination **"of facts that expose the defendant to a greater punishment than that authorized by the jury's guilty verdict,"** *Apprendi*, 530 U.S. at 494, applies as well to defendants who might be exposed to a possible death sentence under Delaware's capital punishment scheme outlined above. The Supreme Court of Delaware held that it does not, explaining that Delaware's capital punishment scheme – in which the jury's role in the fact-finding process, which itself is a statutory prerequisite to the imposition of a death sentence, is wholly advisory – remained constitutional despite this Court's decision in *Apprendi*. (Appendix A, pp. A-211-A-215).

In *Apprendi*, this Court found that the New Jersey "hate crime" law violated the Sixth Amendment's jury trial provision and the Due Process Clause. In that case, the defendant pled guilty to possession of a firearm for an unlawful purpose, which carried a penalty range of 5 to 10 years in jail. Under a separate statute, described by the New Jersey Supreme Court as a "hate crime" law, an "extended term" of imprisonment between 10 and 20 years could be imposed if the trial judge found, by a preponderance of the evidence, that "the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion . . . " *Id.* at 486-487. This Court held New Jersey's statutory scheme unconstitutional under the Sixth and Fourteenth Amendments. In so holding, the Court stated:

> Other than the fact of a prior conviction, **any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.** With that exception, we endorse the statement of the rule set forth in the concurring opinions in [*Jones v.*

> *United States*, 526 U.S. 227, 143 L.Ed.2d 311, 199 S.Ct. 1215 (1999)]: **"It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."**

Id. 530 U.S. at 490.

* * *

> [I]t does not matter whether the required finding is characterized [as an "element" of the offense or a "sentencing factor"] . . . The relevant inquiry is not one of form, but of effect – **does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?**

Id. 530 U.S. at 494 (emphasis added).

3. Did *Apprendi* Invalidate Delaware's Death Penalty Statute?

In upholding the sentence of death imposed in this case, the Supreme Court of Delaware repeatedly noted that this Court, in *Apprendi*, had left this Court's decision in *Walton v. Arizona*, 497 U.S. 639 (1990) intact. (Appendix A, p. A-208; A-211). This Petition, therefore, squarely presents a question that was not resolved in *Apprendi* itself: Did *Apprendi* invalidate state capital sentencing schemes, such as Delaware's, where the jury's verdict as to the existence of a statutory aggravating circumstance has no binding effect on a sentencing judge?[5] The final

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[5] Delaware's capital sentencing scheme is not unique. In Alabama (Ala. Code Ann. §13A-5-46(e) (West 2001), Florida (West's F.S.A. §921.141), and Indiana (West's A.I.C. §35-50-2-9), the jury's determination as to the existence of a statutory

paragraphs of the majority opinion in *Apprendi* attempted to answer that question by discussing *Walton v. Arizona*, 497 U.S. 639 (1990). In *Walton*, this Court upheld an *Apprendi*-type challenge to the constitutionality of Arizona's death penalty statute.[6] The Court rejected the defendant's argument that the Constitution required that the jury, and not the judge, make the factual determination of the existence or non-existence of a statutory aggravating factor. *Id.* 497 U.S. at 648 ("the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by a jury"). In *Apprendi*, pointing to *Walton*, Justice Stevens attempted to dismiss any argument that the rule announced in

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aggravating circumstance that makes a defendant eligible for the death penalty is not binding on the sentencing judge. In Arizona (A.R.S. §13-703), Colorado (West's C.R.S.A. §16-11-103), Idaho (I.C. §19-2515), Montana (MCA §46-18-301) and Nebraska (Neb.Rev.St. §29-2520), the jury plays no role at all. The entire sentencing process, including the mandatory finding of statutory aggravating circumstances is left entirely to the judge, or in the case of Colorado, to a panel of judges. Conversely, all of the remaining death penalty jurisdictions require that the determination of statutory aggravating factors be proved beyond a reasonable doubt to a jury, whose verdict is binding on the sentencing judge.

[6] Under Arizona law, if a defendant is convicted by a jury of first-degree murder, the court conducts a separate sentencing hearing to determine whether the defendant should receive the death penalty or life imprisonment. Ariz. Rev. Stat. Ann. §13-703(B) (1989). The Arizona statute then directs the judge to "impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in [the statute] and there are no mitigating circumstances sufficiently substantial to call for leniency." Ariz. Rev. Stat. Ann. §13-703(E). See, *Walton*, 497 U.S. at 643-644. Parenthetically, the Delaware Supreme Court characterized the Arizona statute at issue in *Walton* as "similar to the Delaware procedure under section 4209." (Appendix A, p. A-208 n.507).

Apprendi applied to findings of "aggravating circumstances" employed in state capital sentencing schemes. To support his contention that the holding in *Apprendi* did not apply to the determination of aggravating circumstances used in state capital sentencing schemes, Justice Stevens cited a footnote from the dissenting opinion in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998):

> Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.

Apprendi, 530 U.S. at 497 (quoting *Almendarez-Torres*, 523 U.S. at 257 n.2 (Scalia, J., dissenting).

Justice Stevens' view that *Apprendi* did not invalidate Arizona's capital sentencing scheme, upheld in *Walton*, was not endorsed by a majority of the Justices of this Court. The four dissenters in *Apprendi* all agreed that the majority's "expose the defendant to a greater punishment than that authorized by the jury's guilty verdict" rule was in direct conflict with *Walton*:

> The distinction of *Walton* offered by the Court today is baffling to say the least . . . A defendant convicted of first degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty . . . If the Court does not intend to overrule *Walton*, one would be hard pressed to tell from the opinion it issues today.

Id. 530 U.S. at 538 (O'Connor, J., dissenting). Justice Thomas, who joined in the majority opinion, wrote in a separate concurring opinion that the question whether

Walton is still good law after *Apprendi* is "a question for another day." *Id.* 530 U.S. at 522-523 (Thomas, J., concurring).[7] Thus, at least five members of this Court have expressed their doubts about the viability of *Walton* in light of *Apprendi*.[8]

4. *Apprendi* Invalidated Delaware's Death Penalty Statute

The application of *Apprendi* to Delaware's capital sentencing statute turns on the requirement in *Apprendi* that the fact to be established must **"expose the defendant to a greater punishment than that authorized by the jury's guilty verdict"** *Id.* 530 U.S. at 494. (emphasis added). Delaware's death penalty statute violates *Apprendi* because it is structured in much the same way as the New Jersey "hate crime" law that was invalidated in *Apprendi*. Under the Delaware statute, there is a predicate factual determination – the existence or non-existence of a statutory aggravating circumstance – which must be made before a defendant is even exposed to the possibility of a death sentence. In other words, in the same way the New Jersey "hate crime" law "upped the ante" in terms of punishment for a defendant who is convicted of an underlying offense, the Delaware death penalty statute similarly increases the possible punishment for a defendant who has been convicted of First Degree Murder. A sentence of death may be imposed only where first-

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[7] Ironically, Justice Stevens himself has also expressed the view that *Walton* should be reconsidered "in due course" in light of the constitutional principles announced in *Jones v. United States*, 526 U.S. 227 (1999) and subsequently reaffirmed in *Apprendi*. See, *Jones*, 526 U.S. at 253 (Stevens, J. concurring).

[8] The Delaware Supreme Court was in error when it stated that "**a majority** of the Court [in *Apprendi*] concluded that the holding in *Apprendi* did not disturb the line of decisions approving of death penalty statutes like that in Delaware." (Appendix A, p. A-205) (emphasis added).

degree murder is committed under factual circumstances that constitute one of Delaware's statutory aggravating circumstances. The jury's verdict that Capano was guilty of First Degree Murder did not establish the statutory aggravating circumstance that the murder was "premeditated and the result of substantial planning."[9] Completing the analogy, in *Apprendi*, the New Jersey "hate crime" law violated Due Process because the legislature removed the factual determination whether a crime was also a "hate crime" from the jury and gave it to the judge. *Id.* 530 U.S. at 490. Likewise, the Delaware death penalty statute violates Due Process because the Delaware legislature gave the judge the final and conclusive say as to the existence of a statutory aggravating circumstance, while the jury was relegated to an advisory role. The validity of that conclusion is supported by Justice Scalia's concurring opinion in *Apprendi*, which emphasized that the determination of "the facts that determine the . . . sentence to which the defendant is exposed" is part of the Constitution's guarantee of the right to trial by a jury:

> What ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury does guarantee if, as they assert, it does not guarantee – what it has been assumed to guarantee throughout our history – **the right to have a jury determine those facts that determine the maximum sentence.**

Id. 530 U.S. at 498-499 (Scalia, J., concurring) (emphasis added). No matter what the jury did in this case, if the trial judge had not made the factual finding, beyond a reasonable doubt, that the murder in this case was carried

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[9] Some statutory aggravating circumstances can be established by the jury's verdict that a defendant is guilty of First Degree Murder. For example, a defendant can commit First Degree Murder by committing "felony murder." See, 11 *Del.C.* §636(a)(2). Felony murder is also a statutory aggravating circumstance. See, 11 *Del.C.* §4209(e)(1)(j).

out after substantial planning and premeditation, a sentence of death could not have been imposed.

5. Why the Writ Should Issue

This Petition for Writ of Certiorari squarely presents the question whether Delaware's death penalty statute is controlled by *Apprendi* or by *Walton*. This Court's jurisprudence has repeatedly emphasized that "death is different." See, e.g., *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). This distinction between capital and non-capital cases usually runs in the direction of greater procedural protection for capital defendants. Conversely, if *Walton* survives after *Apprendi*, the result is that capital defendants will have **less** procedural protection than *Apprendi* provides to non-capital defendants. As noted above, in *Apprendi* itself, the Justices of this Court appear to be evenly divided on that very issue, with one Justice (Justice Thomas) demurring. Thus, the continued validity of *Walton*, and therefore, death penalty statutes like Delaware's statute, in light of *Apprendi*, is very much an open question.

A number of State and federal courts have echoed Justice O'Connor's dissent in *Apprendi*, noting the irreconcilability of *Walton* and *Apprendi*, but concluded they were bound to follow *Walton* until this Court revisits it. See, *United States v. Promise*, 255 F.3d 150, 159-60 (4th Cir. 2001) (*en banc*) (characterizing the continued authority of *Walton* in light of *Apprendi* as "perplexing, if not 'baffling' " and a "conundrum") (quoting *Apprendi*, 530 U.S. at 538 (O'Connor, J., dissenting)); *Hoffman v. Arave*, 236 F.3d 523, 542 (9th Cir. 2001), *petition for cert. filed*, 69 U.S.L.W. 3763 (U.S. May 23, 2001) (No. 00-1775) (noting that *Apprendi* "may raise some doubt about *Walton*"); *People v. Kaczmarek*, 741 N.E.2d 1131, 1142 (Ill. App. 2000) ("while it appears *Apprendi* extends greater constitutional protections to noncapital, rather than capital defendants, the Court has endorsed this precise principle, and we are in no position to secondguess that decision here"); *Mills*

v. Moore, 786 So.2d 532, 537 (Fla.), *cert. denied*, 121 S. Ct. 1752 (2001) ("Because *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either"). Indeed, one federal circuit judge found this irreconcilability so intolerable that he refused to consider *Walton* authoritative, reasoning that the *Apprendi* Court failed to articulate a "majority position about the continued viability of *Walton*." *Hoffman*, 236 F.3d at 547 (Pregerson, J., concurring separately). Quite recently, in *Ring v. Arizona*, 25 P.3d 1139 (Ariz. Sup. Ct. 2001), *Petition for Writ of Certiorari* filed September 18, 2001 (No. 01-488), the Arizona Supreme Court took the view that *Apprendi* seemed to have overruled *Walton* but that the Court was powerless to give effect to that conclusion until this Court so stated. *Id.* 25 P.3d at 1152. On September 10, 2001, in *State v. Barker*,[10] a trial judge in Indiana, relying on *Apprendi*, invalidated that State's death-penalty scheme. The case is now pending before the Indiana Supreme Court. It is true, as well, that every member of this Court has either authored or joined opinions that state or suggest that *Walton*'s holding is undermined by this Court's more recent decisions,[11] suggest that *Walton* should be reconsidered in light of the principles articulated in these decisions,[12] or note that *Walton* was based on the

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[10] No. 49G05-9308-CF-09544 (Marion Ind. Superior Court, Hawkins, J. September 10, 2001).

[11] *Apprendi*, 530 U.S. at 538 (O'Connor, J., joined by Rehnquist, C.J., Kennedy, and Breyer, JJ., dissenting) ("If the Court does not intend to overrule *Walton*, one would be hard pressed to tell from the opinion it issues today"); *Jones*, 526 U.S. at 272 (Kennedy, J., joined by Rehnquist, C.J., O'Connor, and Breyer, JJ., dissenting) (stating that the constitutional rule identified in *Jones* and subsequently adopted in *Apprendi* cast doubt on the continued viability of *Walton*, and noting that *Walton* was "a better candidate" than *Jones* itself for the application of that rule).

[12] See *Apprendi*, 530 U.S. at 523 (Thomas, J., concurring) (stating that *Walton*'s continued viability in light of the

rationale that Arizona's capital sentencing statute does not authorize the judge to make findings of fact that increase the maximum sentence to which a defendant is exposed.[13]

There can be no doubt that the question presented here, which goes to the constitutionality of the capital sentencing schemes currently in place in nine States,[14] is one of substantial public importance. It is plain that the continued viability of *Walton* is in grave doubt, and that this doubt will persist and intensify until this Court re-examines that decision. Such doubts about the viability of one of this Court's precedents might be tolerable if it pertained to a relatively unimportant question, or one as to which a prompt resolution was not necessary, but the question presented here emphatically does not fall into those categories. The question at issue here implicates constitutional protections that this Court has characterized as "of surpassing importance." *Apprendi*, 530 U.S. at 476. Indeed, it involves the precise issue that this Court identified as "of importance generally in the administration of the death penalty" when it decided to grant certiorari in *Walton* itself. *Walton*, 497 U.S. at 647. Nor can it

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constitutional mandate recognized by Justice Thomas in joining the *Apprendi* majority was "a question for another day"); *Jones*, 526 U.S. at 253 (Stevens, J., concurring) (stating that *Walton* should be reconsidered "in due course" in light of the constitutional principles identified in *Jones* and subsequently adopted in *Apprendi*).

[13] *Jones*, 526 U.S. at 251 (opinion for the Court authored by Souter, J., and joined by Stevens, Scalia, Thomas, and Ginsburg, JJ.) (to distinguish *Walton*, majority undertakes a "careful reading of *Walton*'s rationale," finding that the *Walton* majority "characterized the finding of aggravating facts falling within the traditional scope of capital sentencing as a choice between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available").

[14] See Footnote No. 5, *infra*.

be suggested that any purpose would be served by deferring consideration of the question squarely presented here for a future Term, since the question whether *Walton* should be overruled cannot "percolate" in, or become the subject of conflicts among State and federal courts that are duty-bound to apply *Walton* until this Court overrules it. See, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (state and inferior federal courts must continue to "leav[e] to this Court the prerogative of overruling its own decisions"). *Walton* must and should be re-examined promptly, and the present case is an appropriate vehicle for this reexamination to be undertaken. As long as *Walton* remains unexamined by this Court, every death sentence imposed, and every death sentence carried out, pursuant to the capital sentencing schemes of Delaware, the eight other States enumerated above, and any other States that may determine to implement similar schemes, will be under a heavy cloud of constitutional doubt. During this period of uncertainty, all of the State and federal legislatures will be deprived of crucial guidance in determining whether and how to modify their capital sentencing statutes. See, Margery M. Koosed, *Averting Mistaken Executions By Adopting The Model Penal Code's Exclusion Of Death In The Presence Of Lingering Doubt*, 21 N. Ill. U. L. Rev. 41, 101 (2001) (noting that a "period of uncertainty" will endure until the Court revisits *Walton*). Unless *Walton* is reexamined, an irrational disjunction between the constitutional legitimacy of judge-made factual findings affecting the length of defendant's **imprisonment**, as compared to the legitimacy of such findings affecting the decision to impose a sentence of **death**, will continue to persist. State and federal courts will be burdened as well, in that they will continue to face the daunting tasks of trying to reconcile fundamentally irreconcilable decisions, and of trying to discern principled and coherent boundaries between the spheres in which each of these precedents should govern. See, *Promise*, 255 F.3d at 160 ("It is for the Supreme Court . . . to resolve this conundrum"); *Hoffman*,

236 F.3d at 542-47 (panel split with regard to continued viability of *Walton*); *Ring*, 25 P.3d at 1152 (*Apprendi* appears to have overruled *Walton*, but Arizona Supreme Court remained bound by *Walton*).

Like the statute struck down in *Apprendi*, Delaware's capital sentencing scheme provides that the maximum penalty to which a criminal defendant is exposed may be increased on the basis of factual findings made unilaterally by a judge after conviction by a jury. Indeed, in light of the Court's opinion, the primary distinction remaining between *Apprendi* and the instant case is that in *Apprendi* the Sixth Amendment issue pertained to a ten-year increase in the defendant's potential prison sentence, whereas here the Sixth Amendment question is literally one of life or death. If anything, the "reluctance to entrust plenary powers over the life and liberty of the citizen to one judge" that underlies the Sixth Amendment's jury trial right is **more** pronounced, not less so, when the judge's factual findings determine whether the defendant will live or die. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). For these reasons, and in light of the confusion, uncertainty, and unfairness that the continued authority of *Walton* creates, we ask the Court to take this opportunity to reconsider *Walton* in light of the important constitutional principles announced in *Apprendi v. New Jersey*.[15]

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[15] Petitioner's counsel are aware of one other pending petition for certiorari presenting this question. See Petition for Certiorari in *Ring v. Arizona*, No. 01-488 (filed September 18, 2001).

II. A DEFENDANT IN A CAPITAL MURDER CASE IS ENTITLED, UNDER THE DUE PROCESS CLAUSE, TO HAVE THE JURY INSTRUCTED ON LESSER INCLUDED OFFENSES WHERE THE STATE'S EVIDENCE CONCERNING THE DEFENDANT'S STATE OF MIND RAISED A REASONABLE DOUBT THAT HE WAS GUILTY OF CAPITAL MURDER

1. Entitlement to Jury Instructions on Lesser Included Offenses under the Due Process Clause

In capital cases, a state court's refusal to give the jury the "third option" of convicting the defendant on a lesser included offense may violate the Fourteenth Amendment's Due Process Clause. In *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 2389, 65 L. Ed. 2d 392 (1980), the court held:

> For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense – but leaves some doubt with respect to an element that would justify conviction of a capital offense – the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction. Such a risk cannot be tolerated in a case in which the defendant's life is at stake.

Since *Beck*, this Court has explained its holding in several decisions which raised *Beck* issues. In *Hopper v. Evans*, 456 U.S. 605, 609, 72 L. Ed. 2d 367, 102 S. Ct. 2049 (1982), the Court upheld a conviction under the same Alabama law that was at issue in *Beck* because, under the facts of that case, there was no evidence to support a lesser included instruction. *Id.* at 612-613. The Court reiterated that lesser included instructions were only mandated when supported by the evidence. *Id.* at 611. In *Spaziano v. Florida*, 468 U.S. 447, 455-456, 82 L. Ed. 2d 340, 104 S. Ct. 3154 (1984), the Court explained that the

emphasis in *Beck* was on the reliability of the guilt determination, as opposed to the sentencing consequences of a guilty verdict:

> The Court in *Beck* recognized that the jury's role in the criminal process is essentially unreviewable and not always rational. **The absence of a lesser included offense instruction increases the risk that the jury will convict, not because it is persuaded that the defendant is guilty of capital murder, but simply to avoid setting the defendant free.** In *Beck*, the Court found that risk unacceptable and inconsistent with the reliability this Court has demanded in capital proceedings. **The goal of the *Beck* rule, in other words, is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence** (emphasis added).

See also, *Schad v. Arizona*, 501 U.S. 624, 646, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) ("our fundamental concern in *Beck* was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all").[16]

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[16] Under the sentencing scheme at issue in *Beck* (and under Delaware's sentencing scheme), the trial judge retained discretion to decline to impose the death penalty, even though the jury had convicted the defendant of capital murder. *Beck*, 447 U.S. at 632 n.7 (Under Alabama's death penalty scheme, "it is the judge and not the jury who does the actual sentencing"). Thus, *Beck* is applicable in jurisdictions, like Delaware, which allow for sentencing discretion after a finding of guilt of capital murder. *Beck* itself was such a case.

2. The Delaware Supreme Court's Ruling

In this case, Capano was charged with First Degree Murder based on the allegation in the Indictment that he had "intentionally caused the death of Anne Marie Fahey." See, 11 *Del.C.* §636(a)(1) (Appendix D). Under Delaware law, the distinction between First Degree Murder and the lesser included offenses of Second Degree Murder, Manslaughter and Criminally Negligent Homicide concerns the "state of mind" of the defendant. (Appendix A, p. A-112). See, *Duonnolo v. State*, Del. Supr., 387 A.2d 194, 195-197 (1987). Also, under state law, "a defendant is **entitled** to an instruction on a lesser included offense if the evidence would permit a jury rationally to acquit him of the greater offense and to convict him of the lesser." *Slater v. State*, Del. Supr., 606 A.2d 1334, 1338 (1992) (emphasis in original). See, 11 *Del. C.* §206(c).[17]

In this case, the Delaware Supreme Court conducted a *de novo* review of the evidence and concluded that "there is no rational basis in the evidence to support a charge on any of the lesser included offenses advanced by Capano." (Appendix A, p. A-113; A-118-A-122). Building on that conclusion, the Court then rejected Capano's argument that he was entitled to have the jury instructed on lesser included offenses under *Beck* and its progeny: "Capano's [*Beck*] argument fails because the right to a lesser included offense instruction depends on there being a rational evidentiary basis for that instruction." (Appendix A, p. A-125). The Court pointed to *Hopper v. Evans, supra*, and reiterated that it had already concluded that there was "no rational basis in the evidence" that

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[17] 11 *Del.C.* §206(c) provides that the trial court is "not obligated to charge the jury with respect to an included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense."

would have entitled Capano to instructions on lesser included offenses. (Appendix A, pp. A-126-A-127).

3. Why the Court Should Grant the Writ

Beck and its progeny clearly established the requirement that entitlement to jury instructions on lesser included offenses to capital murder depended on the existence of evidence to support a lesser included instruction. The question at issue here is what kind of evidence will serve to satisfy *Beck*'s "supported by the evidence" requirement? Specifically, is a defendant entitled to lesser offense instructions under *Beck* where the evidence, in its entirety, is sufficient to create reasonable doubt that the defendant acted "intentionally," but does not necessarily establish any lesser state of mind? This question is important because it serves to implement the Due Process safeguard established in *Beck*: that giving the jury the "third option" of convicting the defendant of a non-capital homicide offense serves to enhance the reliability of the jury's guilt phase verdict. Otherwise, state courts can freely avoid *Beck* claims by holding, as did the Delaware Supreme Court, that evidence which serves only to create reasonable doubt that the defendant is guilty of capital murder "does not count" as evidence that would entitle the defendant to lesser offense instructions under *Beck*. This question has not previously been addressed in the Court's *Beck* jurisprudence.

In this case, as discussed herein, the Delaware Supreme Court acknowledged that there was substantial evidence in the record that rebutted or contradicted nearly all of the circumstantial evidence that the State had relied on to establish motive and planning – evidence that was indispensable to a finding of "intentional" murder. See, Appendix A, pp. A-18-A-19. Additional evidence in the record, not cited by the Delaware Supreme Court, also served to rebut the State's theory of the case. On June 12, 1996, two weeks before she died, Fahey became ill at work and passed out. She called Capano,

who picked her up and gave her a ride home. (Appendix F, p. F-1). Furthermore, the jury was not required to believe Gerry's testimony. On cross-examination, the jury heard about Gerry's hostile conversation with his mother shortly after the Proof Positive Hearing, where he admitted he would "make [things] up as I go along" to "keep Tommy [in jail] for life." (Appendix F, p. F-2). The jury was also entitled to reject MacIntyre's trial testimony – a story that she proffered only after receiving immunity from prosecution for statement she had made to federal investigators and a federal grand jury. (Appendix A, p. A-157). At trial, MacIntyre testified that in May 1996, Capano persuaded her to buy a handgun for him, which she immediately gave to Capano and never saw again. (Appendix A, pp. A-57-A-58). Prior to the trial, however, MacIntyre had told investigators a completely different story. She stated that she had purchased a small handgun "a few years ago" for self-defense, but had subsequently taken it apart and thrown it away. She also denied that Capano was with her when she bought the gun or that she had ever given it to him. (Appendix F, p. F-13-F-15). Lastly, while the "consciousness of guilt" evidence strongly suggested that Capano was guilty of something, it does not follow that the only possible inference that a jury could draw was that the "something" was intentional murder. Capano explained that he did not call "911" because of a "selfish" desire to protect himself and to protect MacIntyre. (Appendix A, p. A-18). He testified that it was his desire to keep the accidental death a secret, and not to cover up an intentional homicide, that motivated his subsequent conduct. (Appendix F, p. F-3). It is certainly possible that a jury could have accepted Capano's explanation for what he did after the shooting without necessarily accepting his account of the shooting itself. Namely, that a wealthy, politically connected and respected lawyer had made a panic-driven decision rather than have to explain how Fahey died in the living room of his house – and concluded that Capano's motive

in covering up Fahey's death was to conceal his involvement in a homicide – not necessarily a homicide that was caused by an intentional act.

The Delaware Supreme Court also acknowledged that the above evidence, which served to contradict or rebut the State's theory of the case, was sufficient, if accepted by the jury, to raise a reasonable doubt as to whether Capano "planned" to kill Fahey and then carried out that plan by "intentionally" killing her. (Appendix A, p. A-119) ("If the jury rejected the State's planning evidence, concluding, for example, that the cooler and gun purchases were unrelated to Fahey, it could have returned a verdict acquitting the defendant"). What the Delaware Supreme Court refused to recognize, however, was that this same "reasonable doubt" evidence also served to establish Capano's entitlement to lesser offense instructions under *Beck*.

In rejecting Capano's *Beck* claim, the Delaware Supreme Court held that Capano's "reasonable doubt" evidence simply "didn't count" when it came to entitlement to lesser included offenses under *Beck*. Although the Delaware Supreme Court conceded that "apart from the accident defense offered in Capano's testimony,[18] there is no evidence concerning the **manner** of Fahey's death," (Appendix A, p. A-119), the Court nevertheless characterized as "pure speculation" any scenario other than the one proffered by the State that might bear on Capano's state of mind on the night that Fahey died:

> The possibility that Capano killed Fahey by an act that was reckless, criminally negligent or under the influence of extreme emotional disturbance is based entirely on speculation. Although there is evidence of the disposal of Fahey's

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[18] The Delaware Supreme Court rejected the State's argument that Capano's testimony – that Fahey died as a result of an "accidental" shooting by the hand of MacIntyre – precluded any entitlement to instructions on lesser included offenses under state law. (Appendix A, pp. A-114-A-117).

> body, the parties concede that apart from the accident defense offered in Capano's testimony, there is no evidence concerning the **manner** of Fahey's death. Her body was not recovered and neither was any murder weapon.

(Appendix A, p. A-119) (emphasis in original).

The Delaware Supreme Court reasoned that, to be entitled to lesser offense instructions, Capano had the burden to offer evidence of some alternate scenario for the homicide that suggested a "reckless" or "criminally negligent" state of mind. Merely offering evidence that went only to create a reasonable doubt that the murder was "intentional," was not enough:

> If the State's planning evidence and Capano's accident defense are rejected, it is **possible** that Capano killed Fahey in some kind of jealous rage, or some other reckless or negligent act. But these possibilities are only speculative. They are not supported by any rational basis in the evidence.

(Appendix A, p. A-120) (emphasis in original).

The court then went on to equate the possibility that Capano acted either "recklessly" or with "criminal negligence" with the statutory "affirmative defense" that Capano had acted "under the influence of extreme emotional distress":

> Capano contends that a jury could have decided that Capano killed Fahey after "an argument that raged out of control," a theory that seems to suggest that Capano acted under the influence of extreme emotional disturbance and is guilty of manslaughter. This possibility is said by the defense to be supported by evidence concerning the troubled romantic relationship between Capano and Fahey. Even assuming evidentiary support for this theory, the applicable Delaware

> statute[19] places the burden on the defendant to prove that he acted "under the influence of extreme emotional distress" and "that there is a reasonable excuse or explanation for the existence of the extreme emotional distress."

(Appendix A, p. A-120).[20]

The statement by the Delaware Supreme Court that the jury should have acquitted Capano if they rejected the State's motive and planning evidence, (Appendix A, p. A-119), ignores the very concerns expressed by this Court in *Beck* itself. This case presents the paradigm *Beck* scenario. In fact, there is a substantial ground to believe that at least one juror voted to convict Capano of first degree murder even though that juror did not believe that the State had established Capano's guilt of that offense beyond a reasonable doubt. Consider what happened in the penalty phase of this case. There, the **only** statutory aggravating circumstance relied upon by the State was that the murder was "premeditated and the result of substantial planning." 11 *Del.C.* §4209(e)(1)(u). (Appendix B, p. B-8). In the penalty phase, to prove this statutory aggravating circumstance, the State told the jury that it was relying on the very same circumstantial evidence of motive, planning and consciousness of guilt that it had relied on in the guilt phase to prove "intentional" murder. (Appendix F, p. F-12). Unlike the guilt phase verdict, however, the jury's vote on the question whether the State had proved this statutory aggravating circumstance beyond a reasonable doubt was 11 to 1. (Appendix B, p.

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[19] See, 11 *Del.C.* §641.

[20] Parenthetically, the court's holding that evidence which serves to negate an element of the charged offense, i.e. that the defendant acted "intentionally," does not entitle the defendant to lesser offense instructions, unless there is also evidence that the defendant acted either "recklessly" or with "criminal negligence," appears to unconstitutionally shift the burden of proving the defendant's state of mind to the defendant. See, *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

B-15). These inconsistent verdicts demonstrate that the concerns expressed in *Beck* about the reliability of the conviction decision are real. The penalty phase verdict shows that one member of the jury was not convinced beyond a reasonable doubt that Capano "planned" to kill Fahey. Yet, when faced with the all or nothing choice of either convicting Capano of intentional murder – based on the very same evidence of "planning" – or setting him free, that same juror opted to convict. These inconsistent verdicts suggest that at least one juror was not convinced beyond a reasonable doubt that Capano was guilty of "intentionally" killing Fahey, but voted to convict Capano of First Degree Murder because he (or she) believed, in the words of *Beck*, that Capano was "guilty of a serious, violent offense"and deserved to be punished for it, when the only other option was to set him free.

CONCLUSION

For the reasons and upon the authorities set forth herein, the Petition for Writ of Certiorari should be granted.

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APPENDIX A

SUPREME COURT OF DELAWARE

THOMAS J. CAPANO, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.

Nos. 110 and 149, 1999

2001 Del. LEXIS 349

June 13, 2001, Submitted

August 10, 2001, Decided

PRIOR HISTORY:

Court Below: Superior Court of the State of Delaware in and for New Castle County. Cr. A. No. IN97-11-0720.

DISPOSITION:

AFFIRMED.

COUNSEL:

Joseph M. Bernstein, Esquire (argued), Wilmington, Delaware; Charles M. Oberly, III, Esquire, of Oberly & Jennings, Wilmington, Delaware; L. Vincent Ramunno, Esquire, of Ramunno & Ramunno, Wilmington, Delaware; Of Counsel: David A. Ruhnke, Esquire (argued), of Ruhnke & Barrett, Montclair, New Jersey; Nathan Z. Dershowitz, Esquire, Victoria B. Eiger, Esquire, and Amy Adelson, Esquire, of Dershowitz, Eiger & Adelson, New York, New York; Alan M. Dershowitz, Esquire, Cambridge, Massachusetts; Paul Shechtman, Esquire (argued), of Stillman & Friedman, P.C., New York, New York, for Appellant.

Ferris W. Wharton, Esquire (argued), Loren C. Meyers, Esquire, Timothy J. Donovan, Jr., Esquire, Thomas E.

Brown, Esquire, and Elizabeth R. McFarlan, Esquire, Department of Justice, Wilmington, Delaware, for the State.

JUDGES:

Before VEASEY, Chief Justice, WALSH, HOLLAND, STEELE, Justices, and CHANDLER, Chancellor,* constituting the Court en Banc. STEELE, Justice, with whom CHANDLER, Chancellor, joins, concurring. CHANDLER, Chancellor, with whom STEELE, Justice, joins, concurring.

OPINION BY:

VEASEY

OPINION:

VEASEY, Chief Justice

I. Introduction

Thomas J. Capano was found guilty of first degree murder and sentenced to death for the murder of Anne Marie Fahey. As with all capital cases in Delaware, the proceedings here were divided into a guilt phase, a penalty hearing and a sentencing determination by the trial judge, who gave substantial weight to the jury's recommendation following the penalty hearing.

Capano was arrested for Fahey's murder in November 1997 and indicted in December 1997. His trial began

* Sitting by designation pursuant to Article IV, Section 12 of the Delaware Constitution and Supreme Court Rules 2 and 4(a).

in Superior Court in October 1998. The guilt phase of this proceeding before the jury was quite long, spanning approximately thirty-two trial days spread over ten weeks from October 6, 1998 to January 17, 1999. After the jury unanimously found Capano guilty of first degree murder, the penalty hearing commenced. It lasted for five days and resulted in findings by the jury on aggravating and mitigating circumstances. In the penalty phase the jury found a statutory aggravating circumstance by a vote of 11 to 1 and recommended by a vote of 10 to 2 that the trial judge find the aggravating circumstances outweighed the mitigating circumstances.

After giving proper weight to those findings, the Superior Court Judge sentenced Capano to death on March 16, 1999. This appeal followed.[1]

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[1] Under 11 *Del. C.* § 4209(g) an automatic appeal was docketed in this Court on March 22, 1999. While that automatic appeal was pending, Capano filed his own timely appeal on April 9, 1999. These appeals were later consolidated. Before further proceedings were undertaken in this Court, Capano moved to remand to the Superior Court to permit him to present a motion for new trial in the Superior Court. That motion to remand was granted on May 4, 1999, and this Court retained jurisdiction. After briefing and argument, the motion was denied in an opinion dated September 1, 1999. *See State v. Capano*, 1999 Del. Super. LEXIS 324, Del. Super., Cr. A. No. N97-11-0720, Lee, J., (Sept. 1, 1999) (Mem. Op.). Thereafter, while his appeal was pending, Capano filed a procedural motion requesting a limited remand in connection with his contention that the trial judge should have recused himself. The motion was denied in an opinion dated March 17, 2000. *See Capano v. State*, Del. Supr., 758 A.2d 499 (2000). The recusal issue is raised in this appeal and is discussed below.

Capano asserts the following sixteen grounds for reversal of the conviction and sentence, in the order presented by him on this appeal – not in the order discussed in this Opinion:

1. The trial court's failure to instruct the jury on the lesser included offenses to the charged offense of Murder First Degree;

2. The admission of Fahey's hearsay statements to her psychotherapists and friends;

3. The introduction of prejudicial "bad act" and "character" evidence;

4. Evidence and argument suggesting that Gerry Capano took a lie detector test;

5. Improper cross-examination of Capano and improper remarks to the jury in closing argument;

6. Allowing witnesses to express personal opinions that Capano was guilty;

7. The trial court's failure to investigate juror bias or misconduct and to dismiss a juror for alleged misconduct;

8. Capano's absence from certain office conferences in violation of his Sixth Amendment right to be present at all stages of trial;

9. The trial court's decision not to require the State to turn over to the defense evidence of Gerry Capano's drug use;

10. The trial court improperly limited Capano's allocution;

11. The trial court's charge on the aggravating circumstance that "the murder was premeditated and the result of substantial planning" was erroneous;

12. Delaware's death penalty statute is unconstitutional because it does not require unanimous jury findings with respect to aggravating circumstances;

13. Imposition of the death penalty in this case is disproportionate to the penalty imposed in other cases;

14. The trial judge was not impartial and therefore reversal is required, or in the alternative, a remand to develop facts related to this issue;

15. The trial court's inconsistent admission of evidence of marital infidelity to impeach the credibility of witnesses; and

16. The prosecutor's cross-examination of Capano concerning post-arrest silence.

A. Summary of Conclusions Reached on Appeal

This being an appeal in a death penalty case we apply a high degree of scrutiny to the sixteen issues Capano has presented to us in this direct appeal. Four of the sixteen issues were selected for oral argument. Three of these issues were selected by Capano's appellate counsel in the first oral argument held on October 24, 2000. The fourth issue was selected *sua sponte* by the Court for additional briefing and oral argument held on June 13, 2001.

We deal in this Summary with these four issues and a fifth significant issue that was not selected for oral argument either by Capano or by the Court. The remaining eleven issues are dealt with carefully in this Opinion. But they will not be mentioned in this summary of the conclusions reached on appeal.

As to all sixteen issues we find no reversible error and we affirm the judgment of the trial court. Nevertheless, the five principal issues mentioned in this Summary raise substantial questions that have given us some areas of concern. After a thorough review of the extensive trial record, the voluminous briefs of the parties, two oral arguments and the applicable law, however, our concerns have been resolved. It is now clear to us that there is no reversible error either in the guilt phase or the penalty phase in the proceedings in the Superior Court.

1. The Lie Detector Test

Two major categories of evidentiary issues are dealt with at the outset in this Opinion. The first relates to Gerry Capano's testimony and that of his lawyer relating to a lie detector test. Testimony regarding the results of lie detector tests are normally inadmissible. That was not the issue here. The issue here related to references to the lie detector test involving Gerry. It was the mention of the threat of a lie detector test in testimony describing the denouement of the government's investigation as its agents were seeking to persuade Gerry to testify against his brother.

We hold that mention of the lie detector test as the trigger point for Gerry's decision to cooperate and the related issue of his lawyer's vouching for Gerry's credibility were improper but not reversible error in light of the trial judge's limiting instruction and the totality of all the evidence presented in this long trial.

2. Hearsay Testimony by Fahey's Psychotherapists and Friends

Fahey's diaries, emails between Capano and Fahey and the testimony of Kim Lynch-Horstmann were admitted into evidence by agreement of both the State and Capano. That stipulated evidence painted a general picture of Fahey's state of mind, her rocky, on-again-off-again relationship with Capano and her need for psychological treatment. A central theme of this stipulated evidence involved Capano's efforts to control Fahey's life.

Over Capano's objection, the trial judge admitted other evidence offered by the State tending to show Fahey's state of mind, her attempts to seek psychiatric help and certain incidents that occurred in her relationship with Capano. That evidence, quoting Fahey, was admitted through the testimony of psychotherapists and friends. It was obvious hearsay, but it was admitted in evidence by the trial judge, often with careful limiting instructions to the jury as to its purpose, under exceptions to the hearsay rule for Fahey's state of mind and medical diagnosis or treatment.

We hold that the quotations from Fahey going to her state of mind were properly admitted under established exceptions to the hearsay rules. We further hold that

certain testimony quoting Fahey's recollection of facts was inadmissible under the state of mind exception, but the admission of these factual recitations was not reversible error because the general subject matter was already subsumed in the stipulated evidence that Capano had agreed to present to the jury. We also hold, alternatively, that the psychotherapists' testimony regarding Fahey's statements to them for the purpose of diagnosis or treatment of her mental condition is independently admissible under the medical diagnosis and treatment exception to the hearsay rules. Finally, we conclude that this application of Delaware's exceptions to the hearsay rules does not run afoul of the Confrontation Clause of the United States Constitution.

3. Lesser Included Offenses

Capano contends that the trial judge erred in not instructing the jury that it could convict Capano of the lesser offenses of Murder Second Degree, Manslaughter or Criminally Negligent Homicide. The trial judge concluded that there was no rational basis in the evidence for a charge to the jury on any of these lesser included offenses because: (a) the State's case, if believed by the jury, tended to show only premeditated, first degree murder, and (b) Capano's testimony that the killing was a tragic accident was the only alternative evidence offered, and Capano's testimony was consistent only with an outright acquittal.

We hold that the trial judge was correct in not instructing the jury on the lesser included offenses. We

find no rational basis in this record to support the argument that the jury could acquit Capano of First Degree Murder and convict him of any of the lesser included offenses. The evidence supported only a First Degree Murder conviction or an outright acquittal. Furthermore, we find no federal constitutional violation in the decision of the trial judge to decline to instruct the jury on the lesser included offenses under the facts of this case.

4. Limits on Allocution

Capano contends that the trial judge improperly restricted his right, in the penalty phase, to speak in allocution directly to the jury without being sworn or subject to cross-examination. Capano had testified at length before this jury in the guilt phase and he spoke to them extensively in allocution in the penalty phase. Capano argues that the trial judge improperly denied him the right to discuss or argue facts already in evidence at the guilt phase, and that the trial judge's harsh treatment in cutting him off in the presence of the jury unfairly prejudiced him. The question was first presented on appeal, so we review it on a plain error analysis.

We hold that the trial judge erroneously limited Capano's allocution by not permitting him to discuss or argue in allocution from facts already in the record. But we hold that this error was harmless under all the circumstances and Capano was not unduly prejudiced.

5. Constitutionality of Delaware's Death Penalty Statute

Based on a distinguishable recent United States Supreme Court Opinion, Capano argues that the Delaware Death Penalty Statute is unconstitutional. Capano claims that the statute unconstitutionally permits the trial judge, after a unanimous jury finding of guilt that authorizes the possibility of the death penalty, to decide to impose death without a unanimous jury recommendation in the penalty phase.

We hold that the authority relied on by Capano does not support this argument. The United States Supreme Court has never held that a judge's imposition of a death sentence following a unanimous finding of guilt by the jury and a less than unanimous recommendation of the jury in a penalty phase is a denial of the right to a jury trial or otherwise a denial of due process. We hold that the Delaware Death Penalty Statute is constitutional and was properly applied here.

Accordingly, we have found no reversible error committed by the trial court and no basis to vacate the death sentence, either on the five issues summarized above or on any of the other issues raised on this appeal. Therefore, we affirm the judgment of the Superior Court and remand the matter for the setting of a new execution date.

B. Summary of Background Facts Leading to Trial

The facts of this case, as developed in the evidence adduced over the course of this ten-week trial, are extensive. What follows in this section is a bare summary of

some of the salient facts. More detailed facts are discussed in connection with the various sections of this Opinion dealing with specific issues presented on appeal.

Anne Marie Fahey, the scheduling secretary for Delaware's then Governor Thomas Carper, was last seen alive on Thursday, June 27, 1996, when she went to dinner with Capano in Philadelphia. Fahey's family reported on June 30, 1996, that she was missing. An extensive investigation concerning her disappearance ensued. That investigation culminated in November 1997, over sixteen months later, in Capano's arrest for her murder. Fahey's body was never found, however, and the State was unable to establish the precise manner by which Fahey died.

Capano was a well-known Delaware lawyer and former managing partner at the Wilmington office of a major Philadelphia-based law firm. He was estranged from his wife and is the father of four daughters. He has three brothers (Louis Capano, Jr., Gerard "Gerry" Capano and Joseph Capano) and one sister, Marian (Capano) Ramunno.[2]

Fahey's disappearance was a mystery for a considerable time before Capano was charged with her murder. Capano, who was the last known person to have seen her alive on June 27, 1996, was an early suspect in the investigation by the Wilmington Police. By mid-July 1996, the FBI actively joined in the investigation, and a federal

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[2] We sometimes refer to the defendant as "Capano" or as "Thomas" or "Tom," the first name usually being employed when referring to him in relationship to his brothers. We usually refer to the brothers by their first names (*e.g.*, Gerry, Louis and Joseph).

grand jury heard evidence for over a year. Capano continued to deny any involvement in Fahey's disappearance and even offered various explanations for her whereabouts. Throughout the investigation and until the Fall of 1997, Gerry and Louis Capano, as well as Deborah MacIntyre, a mistress of Tom Capano, continually lied about material evidence that could have implicated Capano, even to the extent of lying to the federal grand jury.

In October 1997, Gerry's house was raided by federal agents who found illegal drugs and weapons. In November 1997 Gerry agreed to become a cooperating witness in exchange for a plea to reduced charges. Louis also began to cooperate with the authorities in November 1997 as part of a plea agreement. MacIntyre likewise eventually agreed to cooperate in exchange for an agreement not to be charged with perjury.

C. *Summary of Facts: The State's Case*

There were many witness [sic] presented by the State in its case-in-chief. The key witnesses included two of Capano's brothers, Gerry and Louis; Deborah MacIntyre; and psychotherapists and friends of Fahey. The State constructed a circumstantial theory of the case, which rested on three broad categories of evidence: (a) "motive," (b) "plan," and (c) "consciousness of guilt."

The State's "motive" evidence consisted of statements Fahey recorded in her diary and those allegedly made to her family, friends and psychotherapists. Fahey began dating Capano in March 1994. She kept this relationship, or at least its intimate nature, hidden from most

of her friends and her family, and even from the psychotherapist she was seeing at the time. Her personal diaries detailed her on-again-off-again relationship with Capano. Importantly, these diaries, as read into evidence by her sister, emails between Capano and Fahey, and the testimony of Kim Lynch-Horstmann were admitted into evidence by stipulation.

In September 1995, Fahey met Michael Scanlon while she was still involved in the relationship with Capano. After a rocky beginning in her relationship with Scanlon, she fell in love with him.

Fahey suffered from a serious eating disorder. Although Capano knew about Fahey's illness, and was actively trying to get her help, Fahey hid her disorder from Scanlon. She also was afraid that Scanlon would learn of her relationship with Capano, a married man, and kept this a secret from him as well.

After Fahey began dating Scanlon, she tried to break off her relationship with Capano, who became very upset and pursued her relentlessly. In a diary entry by Fahey dated April 7, 1996, she wrote that "I have finally brought closure to Tom Capano . . . what a controlling, manipulative, insecure jealous maniac." Also, one of Fahey's psychotherapists, who was treating Fahey in connection with her eating disorder (and whose bills were being paid, at least in part, by Capano) testified that, in the period between February and early April, 1996 Fahey spoke to her often about how she felt "controlled" by Capano. As her relationship with Capano became strained, her eating disorder became aggravated. By April 1996, however, Fahey had come to believe that she and Capano had

established a friendship that she could manage while continuing to become more involved with Scanlon.

The State's theory was, and circumstantial evidence was offered to show, that Capano had already begun to plan Fahey's death. In February 1996, Capano told two of his brothers, Gerry and Joseph, a story about being threatened by one or more unidentified extortionists. Capano borrowed $ 8,000 from Gerry, which he paid back a few days later. This loan was supposedly in connection with the extortion. Some time after borrowing the money, Gerry provided Capano with a handgun that was returned to Gerry by May of that year. Some time between February and May 1996, Capano asked Gerry if he could borrow his boat if he needed to dispose of a body.

In April 1996 Capano purchased a 162-quart marine cooler eventually used to dispose of Fahey's body. In May 1996 Capano had his mistress of seventeen years, Deborah MacIntyre, purchase a gun for him. At trial, MacIntyre testified that on May 13, 1996, Capano drove her to Miller's Gun Center where, at his request, she purchased a handgun while he waited in the car outside. She returned to the car and gave him the gun and some ammunition. MacIntyre said she never saw the gun again.[3]

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[3] MacIntyre originally lied to investigators about their relationship and the gun purchase, but eventually admitted that her fear of losing Capano had driven her to try to protect him.

On Thursday, June 27, 1996, Fahey left work at about 4:30 p.m. and went to an appointment with her psychiatrist. Afterward, Capano picked Fahey up at her Wilmington apartment and drove to a restaurant in Philadelphia for dinner. Their server at the restaurant testified that they "didn't speak to each other at all" and that Fahey looked "haggard and gaunt," and had a "somber" demeanor. Fahey was not thereafter seen alive.

On Friday morning, June 28, 1996, Thomas drove to his brother Gerry's house at about 5:30-5:45 a.m. Thomas asked to borrow Gerry's boat. Gerry testified that he asked Thomas, "Did you do it?" and Thomas replied that he had. Gerry and Thomas agreed to meet later at Thomas' house and Thomas went home.

Thomas took his wife's Suburban, a larger vehicle than his Jeep Cherokee, back to his house to await Gerry. By the time Gerry arrived at about 8:30 a.m., Capano had put a chain and lock on the cooler.

Gerry told Thomas to remove the lock and chain, and the two placed the cooler into the back of the Suburban. They drove together in the Suburban to Gerry's house in Stone Harbor, New Jersey. They carried the cooler onto Gerry's boat, and after purchasing gasoline, they took the boat approximately sixty miles out to sea and dumped the cooler over the side. The cooler did not sink, however. In an unsuccessful effort to sink the cooler, Gerry shot a hole in the cooler with a shotgun used to kill sharks. Finally, Gerry pulled the boat alongside the cooler and, after providing Thomas with two anchors, turned away while Thomas wrapped the body with the chain and weighed it down with the anchors. Gerry turned in time

to see part of a human leg sink down into the ocean. Gerry rinsed out the cooler and removed the lid before tossing both back into the water and returning to Stone Harbor.

They drove back to Thomas' house in Wilmington. They carried the bloodstained love seat and rug from Thomas' "great room" to the garage where Gerry tried to cut up the love seat. Having no luck in dismantling the love seat, they placed it in a dumpster at a nearby construction site operated by their brother Louis, a developer. At this point, Gerry went home. On Saturday afternoon, June 29, 1996, Thomas bought a new rug for his great room.

The Wilmington Police conducted an initial interview with Thomas that Saturday night. They returned on Sunday afternoon to search Thomas' home, conducting an escorted "walk through" with his consent.

Later that Sunday, Thomas spoke with his brother Louis and told him that Fahey had slit her wrists at his home, staining the love seat, but that she was okay. Thomas asked Louis to make sure that the dumpsters at his construction site were emptied the next day (Monday) because he had disposed of the love seat and some of Fahey's personal belongings in the dumpster. Louis ordered the dumpsters emptied on Monday even though they were not all full.

In a later search on July 31, 1996, federal investigators discovered small spots of blood on a wall in Capano's great room. The spots were compared with a sample of Fahey's blood from a blood bank through DNA testing and found to be a likely match.

The remaining relevant details of the State's case are discussed in connection with Capano's various arguments on appeal. Evidence presented in Capano's defense follows.

D. Summary of Facts: The Defense Case

Capano testified in his own defense that Fahey had died as a result of an accidental shooting that occurred in the great room of his house on Thursday, June 27, 1996, the night that Fahey was last seen. Capano testified that after dinner he took her back to her apartment where she dropped off some groceries he had bought for her; he then drove her to his house to watch television, arriving shortly after 10:00 p.m. Later that night, with Fahey still at his house, Capano spoke to MacIntyre over the telephone. They had a brief and unpleasant conversation in which Capano told MacIntyre that she should not come over to his house that night, as she often did.

Capano then testified that several minutes later, at around five minutes past 11:00 p.m., Fahey and Capano were sitting next to each other on a love seat in Capano's great room with the television on. According to Capano, while he and Fahey were talking on the love seat, MacIntyre arrived very upset, yelling and saying things like "Who's this?" and "Is this why you couldn't see me?" Capano said he got up from the love seat and stood to face MacIntyre, who continued yelling. Fahey began to put her pantyhose back on (Capano testified she had taken them off due to the heat) and collected her shoes, telling Capano that she wanted to leave immediately.

MacIntyre then pulled out a gun and threatened to shoot herself. Capano claims that he grabbed her arm to prevent her, causing MacIntyre to accidentally shoot Fahey behind her right ear, killing her instantly. Fahey was lying on the love seat. Capano claims that he and MacIntyre attempted to perform CPR on Fahey and then realized she could not be saved.

In order to protect himself and MacIntyre, Capano never called 911, an act that he referred to on the stand as "cowardly and selfish." Capano testified that MacIntyre dropped the gun, and he took it, as well as the bullet clip that was in MacIntyre's car. Capano made sure MacIntyre was all right and sent her home at about 11:30 p.m. In the State's case on rebuttal, MacIntyre denied these claims and said she was not at Capano's house that night.

Capano said he then cleaned up the blood and put Fahey's body in the cooler he had previously bought. Capano claimed that he went over to Fahey's apartment and arranged it to look as though she had been there. He testified that the next morning, he and Gerry dumped Fahey's body into the ocean off the side of Gerry's boat. Capano's testimony confirmed in many of its essentials the "consciousness of guilt" evidence put forward by the State.

Capano also offered evidence to rebut the State's case based on motive and planning. Regarding his relationship with Fahey, he offered evidence that in the months before her death he and Fahey were no longer lovers but had developed a warm friendship. Emails between the two of them were offered to portray a relationship characterized by affectionate banter. Fahey confided in

Capano regarding personal matters such as her therapy and would turn to him for help with items such as helping her install a new air conditioner.

Capano gave innocent explanations for the evidence of planning offered by the State. He testified that he purchased the cooler as a gift for Gerry for use on his boat. He testified that he borrowed money from Gerry in order to surprise Fahey with a gift of $ 25,000 in cash so that she could get help for her eating disorder. He testified that he did not ask Gerry for a gun or ask to borrow his boat or mention anything about extortionists, but that these were in essence the product of Gerry's confused imaginings resulting from Gerry's drug use.

In this regard, Capano presented expert testimony explaining the phenomenon of "confabulation" in heavy drug users. He also testified that MacIntyre bought the gun for her own protection against his advice. To explain his decision not to reveal Fahey's fate to her family and to investigators, Capano testified that he kept silent in order to protect MacIntyre, with whom he was "deeply in love." In support of this contention he offered letters written between him and MacIntyre while Capano was in jail awaiting trial.

It is against this factual backdrop that we now turn to the arguments that Capano raises on appeal.

II. Preliminary Statement on the Admissibility or Exclusion of Evidence

The ultimate purpose of admitting or excluding evidence is to assist the jury's understanding of the underlying factual bases for its application of the law. For this reason, relevant evidence is presumptively admissible unless barred by constitutional restraints, statutory law, decisional law or court rules.[4]

Courts often provide for the admissibility of certain evidence for only limited purposes when that evidence might be barred for one purpose but admissible for another. In such instances the law requires that the trial judge instruct the jury accordingly.[5] This procedure is calculated to provide the jury with the adequate factual base and breadth of understanding that it needs to render a fair verdict consistent with the truth,[6] while striking the proper balance between relevant evidence and potential prejudice.

Normally the decision whether to admit or exclude evidence rests in the discretion of the trial judge, and the decision of the judge can be reversed only for abuse of that discretion. If objection is not made, the plain error standard of review is applied. The prejudicial effect of the proffered evidence is often the determinative consideration, requiring the trial judge to make a threshold balancing of probative value and the danger of undue prejudice.[7]

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[4] *See* Delaware Rules of Evidence (D.R.E) Rules 401, 402.

[5] *See* D.R.E. 105.

[6] *See* D.R.E. 102.

[7] *See* D.R.E. 403.

III. References to Gerry Capano's Lie Detector Test

Gerry Capano, one of Tom Capano's brothers, was a crucial witness for the State. His credibility was a principal and hotly contested issue. Gerry's testimony not only established the fact that he and Tom disposed of Anne Marie Fahey's body at sea, but also was offered in support of the State's theory of a planned homicide.

During the government's investigation of Fahey's disappearance, Gerry emerged as possibly a key government witness, but he was not willing to cooperate at first. After the government put pressure on him in connection with his alleged possession of drugs and firearms, Gerry agreed to cooperate with investigators.

Capano argues that references in the testimony to a polygraph (lie detector) examination in connection with the government investigation and Gerry's cooperation undermined the fairness of his trial. Gerry testified on direct examination that: (1) Tom requested an $ 8000 cash loan from Gerry to pay unidentified extortionists not to hurt Tom's children;[8] (2) Tom borrowed Gerry's handgun and returned it after one or two months, well before the disappearance of Anne Marie Fahey;[9] (3) Tom asked

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[8] Tr. of 11/9/98, at 12-13 (testifying that he lent Tom $8000 and that Tom "told me that two people were extorting him" and "were threatening to hurt his kids, ruin his career"). We refer to the trial transcript pages for certain trial days by designating the record reference as "Tr. of [month/day/year]."

[9] Tr. of 11/9/98, at 16 (testifying that Tom "asked me if he could borrow a gun" because "he was afraid that the guy was going to beat him up or hurt him, come to his house and hurt him").

Gerry if he could use Gerry's boat "if either one of these people that was threatening to hurt his kids were to hurt one of his kids and he was to do something to them;"[10] and (4) he and Tom used his boat to dispose at sea of a cooler containing a body.[11]

A. Gerry's Reference to the Lie Detector Test

Gerry testified on direct that he disclosed three of these matters to his lawyer before the police found illegal drugs and weapons in his home and before he was offered a plea agreement in exchange for his testimony against Tom.[12] In contrast, Gerry testified that he did not disclose the fact that he and Tom had discussed Tom's use of Gerry's boat to dispose of a body until after Gerry agreed to cooperate with the police and "before I went and took a lie detector test."[13]

Counsel for Tom Capano immediately moved for a mistrial on the ground that Gerry's reference to the lie

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[10] Tr. of 11/9/98, at 21.

[11] Tr. of 11/9/98, at 23-49.

[12] Tr. of 11/9/98, at 86-88.

[13] Tr. of 11/9/98, at 88. The exact colloquy is as follows:

Q. When did you tell him [Dan Lyons] when you first changed the story that you told him?

A. I didn't tell him that my brother said to me that if somebody was to hurt my kids and I had to do something to them, could we use the boat.

Q. When did you tell him that last part of the story, that if your brother – about your brother asking you if he hurt somebody, could he use the boat?

A. When did I tell him that?

detector test encouraged the jury to assume that Gerry took and passed the test and was therefore telling the truth. The trial court denied the motion, ordered the unresponsive outburst stricken, and instructed the jury to disregard Gerry's lie detector remark. The court's complete instruction to the jury at this point was as follows:

> Members of the jury, immediately before the luncheon break, the defense objected to the unresponsive answer of the witness to Mr. Connolly's question. The answer made reference to a lie detector test.
>
> Such a response is inadmissible, even though the witness did not indicate whether or not he had taken such a test, or if so, what the results might have indicated.
>
> The Courts of this state, the Federal Courts, and those of every other state, have consistently found such tests to be unreliable, and therefore inadmissible as evidence.
>
> Therefore, you are to disregard the witness' response, and you are not under any circumstances to speculate as to whether or not he took such a test, or what the results of such a test

---

Q. When did you tell Dan Lyons that, if you did at all?

A. I did tell him that.

Q. And when?

A. Before I went and took a lie detector test.

Before Gerry testified, the trial court ruled that Gerry could not refer to the lie detector test during his testimony, and the prosecution advised Gerry that he was not to mention the test. Tr. of 11/9/98 Office Conference, at 6-12.

> might have been. You are to in no way consider the witness' response in your determinations.[14]

The initial problem we note is the confusion in the record about whether or not Gerry actually took the lie detector test. In his unresponsive outburst, Gerry fixed the time of his disclosure to the government as being "before I went and *took* a lie detector test."[15] When the trial judge instructed the jury to disregard the witness' response, the trial judge said "the witness did not indicate whether or not he had taken such a test, or if so, what the results might have indicated," and admonished the jury "not under any circumstances to speculate as to whether or not he took such a test, or what the results of such a test might have been."

Whether or not the trial judge accurately characterized Gerry's testimony, any misstatement there may have been was harmless. The testimony was stricken and there were no later references suggesting that Gerry actually took the lie detector test. We now turn to the remainder of this issue.

Capano argues that the trial court abused its discretion by denying Capano's motion for a mistrial after Gerry referred to the lie detector test during his testimony. A mistrial is not automatically required, however, every time a witness mentions a polygraph test.[16] The trial court should grant a mistrial only "if the reference to

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[14] Tr. of 11/9/98, at 113-14.

[15] Tr. of 11/9/98, at 88 (emphasis supplied).

[16] *See State v. Edwards, Me. Supr.*, 412 A.2d 983, 984-85 (1980) ("We do not find it necessary to require a mistrial to be automatic upon any mention of a polygraph examination by a witness.").

the test raises an inference about the result that substantially prejudices the defendant's case" in light of all of the evidence.[17] In assessing the prejudice produced by such references, courts have considered a wide variety of factors, the most important of which are:[18] (1) the effectiveness of a limiting instruction, (2) the extent to which the State's case depends on the witness' testimony, and (3) the extent to which the credibility of the witness is in dispute.[19]

With respect to Gerry's unsolicited comment, the most important factor is the effectiveness of the trial court's curative instruction. As noted above – and it is worth repeating – the trial court instructed the jury that:

> The Courts of this state, the Federal Courts, and those of every other state, have consistently found such tests to be unreliable, and therefore inadmissible as evidence.

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[17] *Id.* at 985-86.

[18] The State also argues that the inadvertence of the comment makes the comment less prejudicial. It matters little, however, whether the reference was inadvertent because "the harm is done by the fact that it was said, regardless of how it arose." *Guesfeird v. State*, 300 Md. 653, 480 A.2d 800, 804 (1984); *see also People v. Yatooma*, 85 Mich. App. 235, 271 N.W.2d 184, 187 (1978) (finding that a mistrial was required although the reference to the lie detector test "was an isolated and apparently inadvertent occurrence").

[19] *Cf. Sawyer v. State*, Del. Supr., 634 A.2d 377, 380 (1993) (describing relevant factors in reviewing denial of motion for mistrial); *see also Guesfeird*, 480 A.2d at 803-06; *Sullivan v. State*, Fla. Supr., 303 So. 2d 632, 634-35 (1974), *cert. denied*, 428 U.S. 911, 49 L. Ed. 2d 1220, 96 S. Ct. 3226 (1976).

> Therefore, you are to disregard the witness' response, and you are not under any circumstances to speculate as to whether or not he took such a test, or what the results of such a test might have been.[20]

On this point, Capano argues that the court's instruction could not prevent or even discourage unwarranted inferences by the jury about Gerry's credibility from the fact that he took or may have taken a polygraph test.[21] As a general rule, we must presume that "the jurors followed the court's instruction."[22] In the present case, we conclude that the trial judge's striking of the testimony and

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[20] Tr. of 11/9/98, at 113-14.

[21] To support this argument, Capano cites *Guesfeird*, 480 A.2d at 806-07 (declaring a mistrial based on an inadvertent reference to a lie detector test despite a cautionary instruction because it was "arguable that rather than being curative, such an instruction might only serve to emphasize the prejudice"); *see also Nichols v. State*, Tex. Crim. App., 378 S.W.2d 335, 337 (1964) (holding that where the prosecutor asked the complainant in a statutory rape case whether she had taken a polygraph test and the witness had answered in the affirmative, "the harm done was so great that no instruction from the court could remove it.").

[22] *Shelton v. State*, Del. Supr., 744 A.2d 465, 483 (2000) (citing *Claudio v. State*, Del. Supr., 585 A.2d 1278, 1280 (1991) and *Kornbluth v. State*, Del. Supr., 580 A.2d 556, 560 (1990)), *cert. denied*, 530 U.S. 1218 (2000); *see also Pennell v. State*, Del. Supr., 602 A.2d 48, 52 (1991) ("This Court has repeatedly held that even when prejudicial error is committed, it will usually be cured by the trial judge's instruction to the jury to disregard the remarks.").

his immediate limiting instruction was sufficient to neutralize any prejudice to the defense from Gerry's comment about his lie detector test.[23]

B. Lyons' Testimony about the Threat of a Polygraph Test

Before the State presented the testimony of Gerry's lawyer, Edmund (Dan) Lyons, Esquire, the State

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[23] *See, e.g., Com. v. Brinkley*, 505 Pa. 442, 480 A.2d 980, 986 (1984) (denying defendant's motion for a mistrial in part because the trial judge issued "immediate and extensive instructions regarding the unreliability and inadmissibility of polygraph tests and cautioning the jury to disregard any testimony concerning such tests"); *Beal v. State*, Ind. Supr., 453 N.E.2d 190, 193 (1983) (affirming conviction despite a prosecution witness' unsolicited disclosure that she had taken a polygraph examination, primarily because "the trial court admonished the jury to disregard the statement and instructed the jury not to take it into account in their deliberations"); *Peyton v. United States*, D.C. Ct. App., 709 A.2d 65, 72-73 (1998) (finding that a "forceful" instruction to disregard a witness' comment about a lie detector test and an explanation of the lack of reliability of such tests was sufficient to minimize the prejudice to the defendant), *cert. denied*, 525 U.S. 854, 142 L. Ed. 2d 108, 119 S. Ct. 134 (1998); *State v. Okumura*, 78 Haw. 383, 894 P.2d 80, 95 (1995) (noting in *dicta* that an instruction to disregard a witness' statement that he took a polygraph test could have " 'eradicated or minimized' " the harmful effects of the testimony); *State v. Atwood*, 171 Ariz. 576, 832 P.2d 593, 625-26 (1992) ("Any possible error was rendered harmless by the court's immediate instruction to the jury to disregard the witness's answer [referring to a lie detector test]"), *cert. denied*, 506 U.S. 1084, 122 L. Ed. 2d 364, 113 S. Ct. 1058 (1993), overruled on other grounds by *State v. Nordstrom*, Ariz. Supr., 25 P.3d 717, McGregor, J. (2001).

requested the trial court's permission to ask whether Lyons had warned Gerry that he could be required to take a polygraph test if he cooperated with federal investigators.[24] The defense strongly objected. In overruling the objection, the trial court permitted the State to ask the question "in a context which is modified to suggest the possibility of the test as opposed to the absolute fact that a test is going to be given."[25] The testimony by Lyons on this point proceeded as follows:

> Q. Now, he had told you up to this point about going out on his boat with his brother Thomas and dumping a body, is that correct?
>
> A. Yes, sir.
>
> Q. He had not told you at this point about his brother Thomas asking him if he could go out and use the boat if he had to dispose of a body prior to June 28th, is that also correct?
>
> A. That's true. He had not told me that.
>
> Q. Now, when you met with him on October 30th of 1997, did you have information to the effect that Thomas had told him that or asked him that prior to June 28th of 1996?
>
> A. Yes.
>
> Q. What did you tell – specifically with respect to meeting with the federal authorities, what did you tell Gerry about whether he could or could not withhold information from the federal authorities if he made a decision to go in?

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[24] Tr. of 11/16/98 Office Conference, at 15.

[25] Tr. of 11/16/98 Office Conference, at 19.

A. I told him what I would tell any other client in that situation. If you make a decision to go in, you have to go in and make full disclosure. You can't hold anything back.

If you do or if you have not told me every little detail and something comes out in the course of meeting with federal prosecutors, it will come back and bite you on the rear end, and it's just crucial, and I said this to Gerry, I need to know everything before we go in because if you hold anything back, you're going to hurt yourself.

Q. Did you also tell him prior to going in – did you also tell him at that meeting that he would or might be required to take a polygraph test?

A. Yes.[26]

The trial judge then immediately instructed the jury that this testimony was admissible for only a limited purpose, namely:

> solely for the purpose of permitting you to consider its impact on the state of mind of Gerard Capano at the time he made the ensuing statement. His state of mind at that time has been placed in issue and is in issue, and you are to consider the question and answer just presented solely for that purpose.
>
> There is no evidence that such a test was administered, and you should not speculate on that since the results would not be admitted into evidence. . . . [27]

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[26] Tr. of 11/16/98, at 130-31.

[27] Tr. of 11/16/98, at 132. The trial judge repeated this instruction during its final charge to the jury. Tr. of 1/13/99, at 241-42.

Putting aside for the moment the issue of potential prejudice engendered by a reference to a lie detector test, we believe that the trial judge's limiting instruction was consistent with a rational theory – namely that it was arguably preferable, on balance, for the jury to hear, with appropriate caution, an explanation of why, at that particular moment, Gerry elected to stop lying and to tell the truth. Permitting this testimony with a limiting instruction may have been considered by the trial judge to be preferable to a course of action that would leave the jury to speculate on a wide range of scenarios for Gerry's apparent epiphany, with the risk that some of the speculative scenarios could have been irrelevant and false.

The State emphasized the impact of Lyons' testimony three times during closing arguments, observing that Gerry did not disclose the conversation about using his boat to dispose of a body until after he was threatened with a lie detector test.[28] A key reference to this testimony in the State's summation is as follows:

> But he [Gerry] told his story, his testimony, to Dan Lyons as early as April 1997, months before his house was raided. And the only piece of the puzzle he left out had to do with the defendant's request that if he killed somebody could he use the boat. That's the only piece missing. And we get that piece when on October 30th Dan Lyons, knowing that Gerry is about to come in and discuss his case with the Government, tells [Gerry] you must tell the complete truth. He threatens him with the possibility of taking a

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[28] Tr. of 1/13/99, at 66-69.

lie detector test and he says you have to tell the complete truth, you cannot hold back.

I want to read you something from Dan Lyons' testimony. Remember, Dan Lyons was Gerry's lawyer and he was asked by Mr. Wharton: "What did you tell – specifically with respect to meeting with the federal authorities, what did you tell Gerry about whether he could or could not withhold information from the federal authorities if he made a decision to go in?"

And Mr. Lyons responded: "I told him what I would tell any other client in that situation. If you make a decision to go in, you have to go in and make full disclosure. You can't hold anything back. If you do or if you have not told me every little detail and something comes out in the course of meeting with federal prosecutors, it will come back and bite you on the rear end, and it's just crucial, and I said this to Gerry, I need to know everything before we go in because if you hold anything back, you're going to hurt yourself."

Question: "Did you also tell him prior to going in – did you also tell him at that meeting that he would or might be required to take a polygraph test?"

Answer: "Yes."

Having advised him of that, what did he do then? Then Mr. Lyons said this – he said: "Well, I said a little bit more. I said look, you have told me everything that happened, but it is possible, and I just don't know, but it is possible that there may have been a situation in which Tom said to you I'm thinking about killing somebody or just raised the issue before June of 1996 and if

> you are holding that back because you just don't want to tell me or it is painful to tell me, or you want to protect your brother you are making a big mistake, because if it happened you are going to hurt yourself.[29]

Capano contends that the trial court committed reversible error by permitting the State to refer to Gerry's lie detector test during its direct examination of Lyons. The State argues that Lyons' testimony was admissible for the limited purpose of showing Gerry's state of mind in that he agreed to disclose incriminating evidence against his brother only after his lawyer warned him that he would have to take a lie detector test as a condition of his plea agreement. Under this theory, the State did not seek to prove that Gerry had taken and passed the lie detector test; instead the State sought to prove only a "triggering event" – that Gerry's decision to disclose the second "extortionist" conversation was triggered by the threat of a lie detector test.

The State also asserts that a reference to a lie detector test raises a concern only where the reference directly or impliedly discloses the *results* of the polygraph. Clearly, the results of a polygraph are inadmissible. Courts acknowledge, however, that "the only logical conclusion [the jurors] could deduce would be that [the witness] passed the polygraph test thus enabling him to complete his plea bargain with the State."[30]

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[29] Tr. of 1/13/99, at 66-68. The State also discussed at length the impact of Lyons' testimony on Gerry's credibility later in its summation. Tr. of 1/13/99, at 205-208.

[30] *Brown v. State*, Ind. Supr., 587 N.E.2d 111, 112-13 (1992); *see also Guesfeird v. State*, 300 Md. 653, 480 A.2d 800, 804 (1984)

Lyons' testimony raises two related issues: (1) whether a reference to the threat of a lie detector test may be admissible evidence and (2) whether Lyons improperly vouched for the credibility of Gerry's testimony by testifying in his capacity as an attorney and an officer of the court that he had warned Gerry about the possibility of a lie detector test.

1. Admissibility of Lyons' Reference to the Threat of a Lie Detector Test

As a general rule, and as the trial court instructed here, the results of polygraph tests are "inadmissible for any purpose because their scientific reliability has not been established."[31] Similarly, polygraph evidence is

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("Simply putting before the jury the fact that a lie detector test was taken can be the equivalent of revealing the results.").

[31] *Foraker v. State*, Del. Supr., 394 A.2d 208, 213 (1978) (citations omitted); *see Melvin v. State*, Del. Supr., 606 A.2d 69, 71 (1992); *Whalen v. State*, Del. Supr., 434 A.2d 1346, 1354 (1981); *Peyton v. United States*, D.C. Ct. App., 709 A.2d 65, 70 (1998); *People v. Nash*, 244 Mich. App. 93, 97, 625 N.W.2d 87 (2000); *see also Duonnolo v. State*, Del. Supr., 397 A.2d 126, 132 (1978) ("Testimony that an accused refused to take a polygraph test, without more, amounts to impermissible comment upon the accused's Fifth Amendment right to remain silent."). Although several federal courts were forced to abandon a strict rule prohibiting the admission of polygraph test results after the United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), these courts have retained a strong suspicion of polygraph evidence. *See, e.g., United States v. Cordoba*, 9th Cir., 104 F.3d 225, 227-8 (1997) ("With this holding, we are not expressing new enthusiasm for admission of unstipulated polygraph evidence. The inherent problematic nature of such

never admissible if it is offered to establish that a witness' version of the events is true. These rules reflect a legitimate concern that jurors will assume that the results of the polygraph are accurate and will therefore accept the witness' testimony as the truth. Put differently, the concern is that a potentially unreliable lie detector test will take the place of the jury in assessing the credibility of witnesses.[32]

The State nevertheless contends that evidence of the "threat" of a polygraph test is admissible, even if the results of the polygraph test are not admissible. Curiously, neither party in all the voluminous briefs[33] filed in the case before us cites *Whalen v. State*,[34] where we held,

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evidence remains. . . . Polygraph evidence has grave potential for interfering with the deliberative process."); *United States v. Posado*, 5th Cir., 57 F.3d 428, 431-34 (1995) ("We do not now hold that polygraph examinations are scientifically valid or that they will always assist the trier of fact, in this or any other individual case.").

[32] *See Holtzman v. State*, Del. Supr., 718 A.2d 528 (1998) (ORDER), Order at P14 ("A fundamental premise of our criminal trial system is that 'the jury is the lie detector.' "); *United States v. Alexander*, 8th Cir., 526 F.2d 161, 168 (1975) ("When polygraph evidence is offered in evidence at trial, it is likely to be shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi."); *People v. Barbara*, 400 Mich. 352, 255 N.W.2d 171, 194 (1977) ("Further concern is based on a fear that by use of a polygraph, we run dangerously close to substituting a trial by machine for a trial by jury.").

[33] The extensive briefs and supplemental memoranda filed by Capano and the State covered a total of 446 pages.

[34] Del. Supr., 434 A.2d 1346, 1353-54 (1980) (admitting "the fact of" a lie detector test as evidence that the defendant's confession was voluntary). Several federal courts permit

in the unique circumstances of that case, that a polygraph test may be admissible as a relevant fact in assessing the voluntariness of a defendant's confession. The *Whalen* Court reached this conclusion because the "presentation to the trier of fact of all relevant facts and circumstances is appropriate when it must assess the totality of the circumstances" surrounding the *defendant's* confession.[35]

The holding in *Whalen* preserves the rule prohibiting "the use of the results of a polygraph test without prior agreement of the parties."[36] We believe that any reference to a polygraph test is potentially mischievous. In fact, we cannot now foresee scenarios in which the potential for prejudice would not exist. At the very least, the trial court must apply enhanced scrutiny (in addition to a Rule 403 analysis) to assure that any references to a polygraph are necessary, of minimal prejudicial impact and that no

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prosecutors to prove that a defendant's confession was "voluntary" by proving that the defendant made the confession after failing a polygraph test. *See, e.g., Tyler v. United States*, 90 U.S. App. D.C. 2, 193 F.2d 24, 31 (1951), *cert. denied*, 343 U.S. 908, 96 L. Ed. 1326, 72 S. Ct. 639 (1952); *United States v. Johnson*, 3d Cir., 816 F.2d 918, 923 (1987); *United States v. Miller*, 9th Cir., 874 F.2d 1255, 1262 (1989); *United States v. Kampiles*, 7th Cir., 609 F.2d 1233, 1244-45 (1979), *cert. denied*, 446 U.S. 954, 64 L. Ed. 2d 812, 100 S. Ct. 2923 (1980).

[35] *Whalen*, 434 A.2d at 1353 (citing *State v. Rooks*, Del. Supr., 401 A.2d 943 (1979)). The *Whalen* Court endorsed the view that "when a confession was made during, immediately after, or as the result of test questioning, and the defendant alleges his confession was involuntary, the evidence about the test and the surrounding circumstances are considered part of the totality of the circumstances which must be evaluated." 434 A.2d at 1353 (citations omitted).

[36] 434 A.2d at 1354.

other appropriate alternative evidence is available to establish the relevant operative fact sought to be admitted. The trial court must also formulate a clear cautionary instruction for the jury.[37]

Whalen may not be read broadly to permit references to a lie detector test to prove a limitless range of operative facts, and it must be limited to the circumstances that were present in the *Whalen* case itself.[38] Accordingly, we do not pronounce today a *per se* exclusionary rule prohibiting any reference to a lie detector test, but we caution that one cannot rely on a broad reading of *Whalen*.

The State characterizes the "threat" of a polygraph test as an event like any other event that could cause a *witness* to change his or her testimony in one direction or the other.[39] But a lie detector test is fundamentally

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[37] *See* D.R.E. 105.

[38] Although the *Whalen* Court was motivated by the need for evidence to rebut an assertion of coercion of a confession, we can identify no principled distinction between using the threat of a lie detector test as evidence of the voluntariness of a defendant's confession and using it as evidence of the motivation or timing of a witness' disclosure. Confining *Whalen* to its context (that is, to rebut an assertion of coercion of a confession), the holding does not apply to the present case, and it is not a proper authority to admit Lyons' testimony. We need not decide in this case whether *Whalen* would be overruled if its identical circumstances were to be presented in a future case.

[39] In *United States v. Piccinonna*, 11th Cir., 885 F.2d 1529, 1536 (1989) (*En Banc*), the court found two exceptions to the "per se exclusionary rule": (1) where the parties agree to its admission and (2) where the evidence is "used to impeach or corroborate the testimony of a witness at trial" and the evidence satisfies three conditions, including the Rule 403 balancing test.

different from other events because its purpose as an *investigative* tool is to gauge whether a person is telling the truth.[40] In the present case, the jury may have inferred from Lyons' testimony: (1) that Gerry was *not* telling the truth before the threat of a lie detector test and (2) that he *was* telling the truth after the threat.[41]

The admission of Lyons' testimony relating to a threat of a polygraph test in this situation was improper because it runs the risk that a reasonable juror could infer that the witness was lying before the threat of a test but telling the truth afterward. Given the judicial suspicion of lie detector tests and the potentially prejudicial nature of

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Id. The second exception implicitly acknowledges that there is no significant difference between admitting polygraph evidence to prove that a confession was voluntary and admitting the evidence to prove the credibility of a witness.

[40] *See People v. Barbara*, 400 Mich. 352, 255 N.W.2d 171, 193-94 (1977) ("The fact is that the polygraph, while scientific evidence, is different from other scientific evidence. 'The quantity it attempts to measure the truthfulness of a witness is . . . directly related to the essence of the trial process.' ") (quoting Note, *The Emergence of the Polygraph at Trial*, 73 Colum. L. Rev. 1120, 1141 (1973)).

[41] *Cf. Holtzman v. State*, Del. Supr., 718 A.2d 528 (1998) (ORDER), Order at P14 ("Although [the defendant] agreed to submit to the examination, the absence of presenting any evidence of a favorable outcome could lead the jury to either conclude that [the defendant] changed his mind or the 'polygraph equivalent' test results had not been favorable, since the prosecution went forward."); *State v. Edwards*, Me. Supr., 412 A.2d 983, 986 (1980) ("The jury could have inferred naturally and reasonably that she had taken the test in connection with her account of the events of the evening and that the result confirmed her account.").

the lie detector testimony described above, the threshold question is whether the trial court abused its discretion in permitting the State to elicit testimony that Gerry disclosed information in response to the threat of a lie detector test[42] even for the limited purpose for which the testimony was admitted and within the context of the trial court's limiting instructions.

Under the circumstances of this case, however, we find that the trial court's admission of Lyons' reference to a lie detector test does not require a reversal of Capano's conviction. We believe there is no basis to conclude that the jury would ignore the cautionary instruction given in this case. As discussed in subsection C of this Section, we conclude that any error in allowing this testimony is harmless when viewed through the prism of the totality of the record and in light of the trial judge's limiting instruction.

2. Improper Vouching by Lyons

Capano also contends that Lyons' testimony taken as a whole improperly vouches for Gerry's credibility. This issue involves two related questions: (1) whether Lyons' testimony improperly attested to Gerry's credibility and (2) whether the State used Lyons' credentials as an experienced lawyer and former federal prosecutor to bolster Gerry's testimony.

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[42] *See Williamson v. State*, Del. Supr., 707 A.2d 350, 354 (1998) ("We review for an abuse of discretion questions concerning the admissibility of evidence.").

At the outset, we note that the trial court admitted Lyons' testimony based on "its impact upon the state of mind of Gerard Capano at the time he made the ensuing statement [about Tom's request to use his boat]."[43] Nevertheless, it is clear that the State presented the testimony to explain why Gerry did not disclose this information until after he began to negotiate an arrangement with prosecutors.[44] Thus, the credibility of Gerry's testimony was at issue, not his state of mind at the time of his final disclosure.

As a general rule, a witness may not bolster or vouch for the credibility of another witness by testifying that the other witness is telling the truth.[45] The State argues that

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[43] Tr. of 11/16/98, at 132. The trial court presumably issued this instruction to avoid creating a direct connection between the polygraph testimony and Gerry's credibility in the minds of the jurors.

[44] During an office conference, the trial judge recognized that Gerry's credibility was at issue, observing that the defense intended to argue that Gerry fabricated the conversation with Tom about using the boat and that the State sought "to explain this last epiphany" by reference to the "threat of a possible polygraph." Tr. of Office Conference of 11/16/98, at 18.

[45] *See Holtzman*, Order at P13 ("The police officer's personal belief that the complainant was telling the truth was not admissible evidence."); *see also Re v. State*, Del. Supr., 540 A.2d 423, 427 (1988) (observing that an expert may not generally testify on the credibility of a defendant unless the testimony "is used to illustrate the unreliability of the defendant's statements when they are being offered as a basis for an expert opinion") (citing *Wheat v. State*, Del. Supr., 527 A.2d 269, 275 (1987)); *cf. Trump v. State*, Del. Supr., 753 A.2d 963, 967 (2000) (" 'The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or

the trial court did not err in this respect because Lyons did not vouch for Gerry and did not express an opinion on the veracity of Gerry's testimony. But the cases are clear that improper vouching includes testimony that *directly or indirectly* provides an opinion on the veracity of a particular witness.[46]

In the present case, Lyons testified that he warned Gerry: (1) about the possibility of a lie detector test; (2) about Gerry's obligation to "make full disclosure"; and (3) not to "hold anything back" from the federal prosecutors.[47] In our view, these three points made by Lyons, when taken together, created a substantial risk that the jury would conclude that Lyons' admonitions to Gerry induced him to tell the truth to the federal prosecutors and hence to the jury. It is implicit in Lyons' testimony that Lyons believed his own admonitions to have been effective. Thus, this testimony is a subtle and indirect version of vouching for Gerry's credibility.

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the guilt of the defendant.' ") (quoting ABA Standards for Criminal Justice § 3-5.8(b) (3d ed. 1993)). Under D.R.E. 608(a), "the credibility of a witness may be attacked or supported by evidence of reputation, but subject to these limitations: (1) The evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked."

[46] *See Wheat*, 527 A.2d at 275 ("The expert may not directly or indirectly express opinions concerning a particular witness' veracity or attempt to quantify the probability of truth or falsity [of a witness' statements]."); *see also Powell v. State*, Del. Supr., 527 A.2d 276, 279 (1987) (applying the analysis in *Wheat*).

[47] Tr. of 11/16/98, at 130-31. The text of the relevant passage is reproduced in the text accompanying note 26 *supra*.

The problem is compounded by the State's elicitation from Lyons of his credentials as an experienced lawyer and former federal prosecutor. This testimony highlights the potential that Lyons' status as an experienced lawyer may have imparted credibility to Gerry's testimony – owing not to Gerry's believability but to the credentials of the lawyer-witness vouching for him.[48] Given Lyons' experience with federal prosecutors, a jury would be likely to infer that Gerry did not disregard Lyons' emphatic directive to make full disclosure.

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[48] Lawyers often testify as fact witnesses in other contexts where their appearance as a lawyer-witness is not problematic. But a lawyer's appearance as a witness can be problematic in at least two instances: (1) where, as here, the lawyer vouches directly or indirectly for the credibility of another witness; and (2) where the lawyer is also an advocate in the same trial. *See* Delaware Lawyers' Rules of Professional Conduct Rule 3.7(a) ("A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client."); Comment to Delaware Rules of Professional Conduct Rule 3.7 ("It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof."); *cf. In the Matter of Estate of Waters*, Del. Supr., 647 A.2d 1091, 1096-98 (1994) (holding that it was plain error for attorney to serve as trial advocate and testify on behalf of estate in will contest); *Miller v. State*, Del. Supr., 750 A.2d 530, 2000 Del. LEXIS 59, *15 (2000) (ORDER) ("The vouching by the prosecutor as to the credibility of a witness for the State is a special concern because jurors may easily interpret vouching by the prosecutor as an official endorsement of the witness and in doing so, overlook important aspects of the witness' credibility.").

In *Graves v. State*[49] we reversed a conviction in part because the lawyer for two prosecution witnesses improperly vouched for them. Before the witnesses took the stand, the witnesses' lawyer appeared as a witness for the State and testified that he had urged the witnesses to cooperate with investigators and to "tell the truth."[50] The lawyer also testified extensively about his impressive credentials and about specific honors that he received as a criminal defense lawyer.[51] In that situation, this Court was concerned that the lawyer's "recital of his professional attainments and his standing in the legal community could serve but one purpose: that a lawyer of his standing would not represent clients who were not truthful."[52]

In the present case, the State did not exalt Lyons' credentials in the same blatant manner as in *Graves*, but Lyons did testify that he worked as a federal prosecutor for eight years and had been in private practice since 1982.[53] He also testified extensively about his dealings with federal prosecutors on Gerry's behalf. This was a subtle but clearly effective method of permitting Lyons to vouch for Gerry's truthfulness in his disclosures to federal prosecutors. There is thus a concern that the jury may have inferred that a lawyer of Lyons' experience

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[49] 1994 Del. LEXIS 231, Del. Supr., No. 144, 1993, Walsh, J. (Aug. 1, 1994) (ORDER).

[50] *Graves*, 1994 Del. LEXIS 231, *5 (internal quotation marks omitted).

[51] *See id.*

[52] 1994 Del. LEXIS 231, *8.

[53] Tr. of 11/16/98, at 64-65.

may have believed that Gerry's testimony was credible. Although it was error to permit Lyons to testify in a manner that amounted to vouching, compounded by using Lyons' credentials to bolster Gerry's credibility, the admission of Lyons' testimony was harmless in view of the entirety of the evidence.

C. Harmless Error Analysis of Lyons' Testimony

Under "well established" Delaware law, "an error in admitting evidence may be deemed 'harmless' when 'the evidence exclusive of the improperly admitted evidence is sufficient to sustain a conviction. . . . ' "[54] In this case,

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[54] *Nelson v. State*, Del. Supr., 628 A.2d 69, 77 (1993) (quoting *Johnson v. State*, Del. Supr., 587 A.2d 444, 451 (1991)); *see also Seward v. State*, Del. Supr., 723 A.2d 365, 373 & n.27 (1999) (citing *Gordon v. State*, Del. Supr., 705 A.2d 243, 1997 Del. LEXIS 482, *4 (1997) ("An error in admitting evidence is harmless only when the properly admitted evidence, taken alone, is sufficient to support a conviction.")). "Alternatively, when the evidentiary error is of a constitutional magnitude, the convictions may be sustained if the error is 'harmless beyond a reasonable doubt.' " *Nelson*, 628 A.2d at 77 (citations omitted).

This distinction is well established in federal harmless error jurisprudence. *See United States v. Bruck*, 1st Cir., 152 F.3d 40, 44 (1998) ("We . . . answer[ ] in the negative the harmless-error inquiry appropriate for non-constitutional error: was the putative error likely to have 'had substantial injurious effect or influence in determining the jury's verdict?' ") (citation and internal quotation marks omitted); *United States v. Zehrbach*, 3d Cir., 47 F.3d 1252, 1265 (1995) (*en Banc*) ("The standard of review in determining whether an error is harmless depends on whether the error was constitutional or non-constitutional."), cert denied, 514 U.S. 1067 (1995). The Third Circuit finds a non-constitutional error harmless when "it is *highly probable* that the

we must consider the effect of the references to lie detector tests and Lyons' improper vouching testimony on the credibility of Gerry Capano's testimony. The prejudice involved here "is limited to the potential that the jury might give undue credence"[55] to the admissions Gerry made to his lawyer under threat of a lie detector test and after being counseled by the lawyer to tell the truth. In determining the effect of this potentially improper bolstering, we will consider the extent to which the State's case depends on the witness' testimony and the extent to which the credibility of the witness is in dispute.[56]

Although we place emphasis on the evidence put forward by the State, our harmless error jurisprudence requires us to examine the entire record.[57] Our decision in *Van Arsdall* is an instructive illustration of the scope of the analysis.[58] In that case, in considering the significance

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error did not contribute to the judgment." *Zehrbach*, 47 F.3d at 1265 (emphasis in original and citation omitted).

[55] *Whalen v. State*, Del. Supr., 434 A.2d 1346, 1354 (1981).

[56] *See, e.g*, Kaminski v. State, Fla. Supr., 63 So. 2d 339, 340-41 (1953); *Sullivan v. State*, Fla. Supr., 303 So. 2d 632, 634-35 (1974), *cert. denied*, 428 U.S. 911, 49 L. Ed. 2d 1220, 96 S. Ct. 3226 (1976); *see also Sawyer v. State*, Del. Supr., 634 A.2d 377, 380 (1993) (stating factors relevant to a review of a denial of motion for mistrial).

[57] *See Van Arsdall v. State*, Del. Supr., 524 A.2d 3, 10-11 (1987).

[58] *See id.* at 11 (noting that "Van Arsdall himself admitted at trial that he had returned [to the crime scene]" and therefore the tainted "testimony, standing alone, appears to have established nothing with regard to the fact of Van Arsdall's presence at the scene of the crime which could have had an effect on the jury's verdict"). Courts performing harmless error analysis have

of the tainted testimony in light of the defendant's admission, made on the stand at trial, as to his presence on the crime scene, we stated:

> The reviewing Court must consider both the importance of the error and the strength of the other evidence presented at trial. . . . It is necessary to review the entire record to determine the significance of the error. . . . Ultimately, the Court must weigh the significance of the error against the strength of the untainted evidence of guilt to determine whether the error may have affected the judgment.[59]

We have noted that "any harmless error analysis is a case-specific, fact-intensive enterprise."[60]

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considered the strength of the defendant's case as part of its analysis of the strength of the State's case, *e.g.*, the extent to which the defendant's testimony was contradicted or implausible. *See Hanrahan v. Thieret*, 7th Cir., 933 F.2d 1328, 1340 (1991) ("Supreme Court precedent also suggests the necessity and appropriateness of an analysis of [the] defense. The less believable the defense, after all, the more likely the conclusion that the constitutional error did not contribute to the conviction.") (citations omitted), *cert. denied*, 502 U.S. 970, 116 L. Ed. 2d 464, 112 S. Ct. 446 (1991); 933 F.2d at 1340 n.29 ("Of course, to go beyond this inquiry and to decide [defendant's] innocence or guilt would usurp the function of the jury. To determine that one party's version of events is less believable, however, is not to make that ultimate determination."); *see also United States v. Charley*, 10th Cir., 189 F.3d 1251, 1271 (1999) ("Furthermore, there were three aspects of Defendant's testimony that were flatly contradicted by other witnesses."), *cert. denied*, 528 U.S. 1098, 145 L. Ed. 2d 707, 120 S. Ct. 842 (2000).

[59] *Van Arsdall*, 524 A.2d at 10-11 (citation omitted).

[60] *Dawson v. State*, Del. Supr., 608 A.2d 1201, 1204 (1992); *see also Barrow v. State*, Del. Supr., 749 A.2d 1230, 1245-46 (2000)

It is undisputed that Gerry provided the State with important evidence from which a jury could infer that Capano began planning Fahey's murder long before her death and that he disposed of her body at sea. Capano vigorously contested Gerry's credibility on several grounds, including: (1) his plea agreement with federal prosecutors, (2) his drug use and expert testimony concerning "confabulation" of events by drug users,[61] and (3) Gerry's conversation with his mother indicating that he would fabricate facts to incriminate Tom.

1. Effect of Lyons' Testimony on the Credibility of Gerry's Testimony

It is clear that the State regarded Gerry as a key witness and his credibility as crucial. In closing argument, the State said that "the most important piece of evidence is Gerry's testimony."[62] The State also emphasized that "Gerry solves the case" and that "if it wasn't for Gerry and Dan Lyons, he [Capano] might have got away with it."[63] Capano refers to Gerry as "a critical

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(evaluating the record in the case and the State's theory of the case).

[61] According to testimony at trial, confabulation describes a peculiar mental process in persons who engage in heavy use of alcohol and illegal drugs. In these persons, the mind tries to fill gaps in memory by inserting "things that either the person thinks must have been what happened or maybe the person has heard that these things happened or it might have been suggested to the person or even asked as a question." Tr. of 12/14/98, at 116-17.

[62] Tr. of 1/13/99, at 15 (State's Closing Argument).

[63] Tr. of 1/13/99, at 207, 229.

prosecution witness" because "the testimony that Capano had asked him whether his boat would be available if he ever should need it was the most important evidence in the case on the issue of premeditation."

But the fact that Gerry was a critical witness whose credibility was pivotal is not the end of the harmless error analysis. One must place the unfortunate lie detector reference and vouching by Lyons in the context of *all* the evidence, particularly the other admissible evidence corroborating Gerry's testimony.

As noted earlier, Gerry testified about several issues. Most important for our analysis, he testified concerning: (1) the "extortion story" described below and (2) the attempts to hide Fahey's death. It is crucial to examine the extent to which his testimony on these two issues was corroborated or undisputed.[64]

We begin with the fact that most of the testimony regarding the immediate cover-up of Fahey's death, including the disposal of her body, is either undisputed or corroborated.[65] Capano admitted to dumping Fahey's body over the side of Gerry's boat.[66] The events of that

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[64] *See Van Arsdall*, 524 A.2d at 11.

[65] Capano's brief says that, "The final category of evidence, which was *largely undisputed* by the defense at trial, related the steps taken by Capano after Fahey's death to dispose of physical evidence that might link him to disappearance." For example, Gerry testified that on Friday, June 28, after disposing of the body, he went to Capano's home and helped him dispose of a bloodstained couch. Tr. of 11/9/98, at 54-56.

[66] Capano testified: "I used the chain and attached the two anchors that Gerry had given me and then tilted the cooler so

morning are corroborated by eyewitness testimony and physical evidence, such as phone records and gas receipts.[67]

The State emphasized in closing argument that when Gerry came forward with his story about the cooler, it was a story that he could not prove and might invite disbelief. But the cooler finally surfaced, having been found at sea by a fisherman.[68] Thus, Gerry's story was vindicated, and at trial the evidence of what had happened in disposing of the body was essentially undisputed. As the State argued, the cooler "is the ultimate corroboration of Gerry Capano."[69] It appears to us that much of the importance ascribed to Gerry's testimony by the State is linked to this portion of his testimony, for the reason that only Gerry could give direct testimony concerning the disposal of Fahey's body in the State's case. Tom Capano in the defense case corroborated the essence of Gerry's testimony concerning the body disposal. This testimony does not, standing alone, show that Capano actually killed Fahey or how. But it does show a cover-up, and thus consciousness of guilt.

The "consciousness of guilt" evidence was not contested at trial. Thus, we must focus on the main element of Gerry's testimony that was disputed: the evidence of

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that Anne Marie's body came out." Tr. of 12/29/98, at 110. *See Hanrahan*, 933 F.2d at 1340 (noting the appropriate use of admissions by defendant in the context of harmless error analysis).

[67] Tr. of 1/4/99, at 127-28.

[68] Tr. of 12/2/98, at 121-24.

[69] Tr. of 1/13/99, at 54.

planning and, more specifically, the alleged conversations about extortionists. According to Gerry, Thomas approached him in February 1996 and asked to borrow $ 8,000 in cash.[70] Gerry testified that Tom's explanation for this request was that "a guy and a girl" were "extorting" Tom, "threatening to hurt his kids and ruin his career."[71] Gerry testified that he went to the bank, cashed a check, and gave Tom the money.[72]

Gerry further related at trial that in a later conversation, Tom said that he was scared that "the guy was going to beat him up or hurt him," and asked to borrow one of Gerry's guns.[73] Tom later returned the gun unused.[74] Finally, Gerry testified that Tom asked if he "could use the boat" if the extortionists "hurt his kids" and "he was to do something to them."[75]

The State used this testimony as evidence of planning. Capano disputes Gerry's testimony on these points. The State's theory was that Thomas was thinking ahead about using Gerry's boat to dispose of Fahey's body, and feeding Gerry a story about extortionists so that Gerry

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[70] Tr. of 11/9/98, at 11-13.

[71] *Id.* at 12, 21.

[72] *Id.* at 13.

[73] *Id.* at 16.

[74] *Id.* at 19-20.

[75] *Id.* at 21. The first reference to the lie detector test happened just after Gerry repeated this testimony. A curative instruction was then given. As discussed below, this statement presaging Capano's actual use of the boat is ultimately the most troublesome testimony tainted by the references to the lie detector test.

would think there was a "legitimate" reason for this use of the boat.[76] According to the State's theory, borrowing $ 8,000 in cash was a premeditated attempt to support the extortionist story because Capano had at least $ 125,000 in his checking account at all times in February 1996, and over $ 150,000 on the day he borrowed the money.[77]

The State also argued that the jury could infer that Capano borrowed the gun at that time as a premeditated step toward carrying out the murder.[78] The State argued to the jury that Thomas later returned the gun to Gerry (and had MacIntyre purchase a different gun) because Thomas realized that this gun would be easily traceable to him if recovered after he used it to kill Fahey.[79] According to the State, all of this planning connected to the extortion smokescreen took place just when Fahey was beginning to truly distance herself from Capano, supplying a timely motive.

The references to lie detector tests tended to bolster the credibility of the State's planning evidence that was centered on Gerry's testimony. Nevertheless, we find that there are significant factors in the context of the totality of the State's case militating against the likelihood that these improper references constituted such substantial prejudice to Capano that we should reverse the conviction and sentence.

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[76] Tr. of 1/13/99, at 29-30 (State's Closing Argument).

[77] Tr. of 12/29/98, at 255-56.

[78] Tr. of 1/13/99, at 39, 51-52 (State's Closing Argument).

[79] *Id.* at 52.

First, Gerry's testimony about the extortionist story is circumstantially corroborated. The fact that Thomas borrowed $ 8,000 from Gerry in early February 1996 is admitted by Thomas and established by bank records offered by the State and admitted into evidence.[80] Capano's own explanation for the transaction appears strained and its credibility was strongly contested at trial.[81]

The State attacked this explanation on several grounds. The sequence of the transactions, as evidenced by processing dates on the checks, contradicted Capano's testimony that he made two trips to the bank before asking Gerry for money. Instead, it appears that he received money from Gerry before or at the same time of his first transaction at the bank. *Id.* at 247-51. This fact contradicts the claim that "embarrassment" over a third trip to the bank was the motive for borrowing cash from Gerry.

Capano testified that he needed the cash in the first place in order to "shock" Fahey; giving her a *check* for $ 25,000 would not achieve that result despite the fact that she earned about $ 30,000 a year. *Id.* at 256-258. Even

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[80] Tr. of 12/29/98, at 247-49 (introduction of checks into evidence at State exhibits 237, 238 and 239).

[81] Capano testified that he borrowed the money, notwithstanding having over $ 150,000 in his account at the time, because he wanted to give Fahey $ 25,000 in cash as part of a plan to help her pay for therapy. *Id.* at 255-56. The reason he gave for not withdrawing his own money was that "I had made a cash withdrawal for $ 8,000 and then one for $ 9,000, and I just felt stupid doing that three days in a row at the same bank with the same lady. So that's why I asked Gerry for the $ 8,000 in cash." *Id.* at 244.

on the assumption that cash was needed to "shock" Fahey, Capano was pressed for an explanation of why he went to Gerry rather than going to another branch of his bank, just one block away from his customary branch. Such a step would have dealt with Capano's professed embarrassment at going to the same teller three days in a row. *Id.* at 251-52. Additionally, Capano was pressed for an explanation of what he had done with the money, which, according to his testimony, Fahey "threw . . . in [his] face." Tr. of 12/30/98, at 25. The credibility of this explanation was also an issue focused on by the State. *Id.* at 28-29.

Second, as with the cash, it is undisputed that Thomas accepted a gun from Gerry.[82] The corroborating evidence mitigates the impact of the lie detector evidence on the credibility of Gerry's testimony. Gerry testified that after Tom told him about the extortionists, he went to his friend Jon Burris to ask whether he knew a "leg

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[82] Capano testified that he reluctantly accepted the gun in order to humor Gerry. *Id.* at 235-237. He contended that he never told Gerry that he needed money to pay extortionists and that the extortionist story was essentially the product of Gerry's imagination. Tr. of 12/30/98, at 28-29. According to Capano, when Capano asked Gerry for the loan, Gerry inquired why Capano needed the money. Tr. of 12/29/98, at 232-239. Gerry then "brought up the idea of extortion," which Capano dismissed by saying "yeah, yeah, yeah. . . . " *Id.* at 234. Capano testified to a later conversation in which Gerry, inebriated and still preoccupied by the extortionists he had supposedly invented, pressed Capano to take a gun for his own protection.

breaker" who could help his brother.[83] Jon Burris gave testimony corroborating Gerry on this point.[84]

Another source of corroboration of Gerry's testimony is MacIntyre's testimony that Capano told *her* about extortionists as an explanation for why he wanted *her* to purchase a gun for him.[85] Additionally, MacIntyre's purchase of the gun for Capano corroborates Gerry's testimony because it leads to the inference that Capano was not a passive and reluctant recipient of Gerry's gun; rather, he was actively seeking a gun by May 1996. All of this corroboration greatly reduces the prejudicial impact of the references to the lie detector test.

Of significant concern is Gerry's statement that "my brother said to me that if somebody was to hurt my kids and I had to do something to them, could we use the boat."[86] Relatedly, this statement is the one most directly bolstered by both Gerry's and Lyons' references to the lie detector test. This is because according to both of these witnesses, it is the one statement that Gerry withheld from Lyons until he was threatened with a lie detector test.[87] Although the lie detector reference certainly risks enhancing the credibility of all of Gerry's testimony, this statement is the one that is directly and specifically bolstered. The State confirms this in closing argument, saying with reference to this statement:

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[83] Tr. of 11/10/98, at 63-64.

[84] Tr. of 12/12/98, at 107-08.

[85] Tr. of 11/18/98, at 75.

[86] Tr. of 11/9/98, at 88.

[87] Tr. of 11/16/98, at 88-118, 130-31.

> But [Gerry] told his story, his testimony, to Dan Lyons as early as April 1997, months before his house was raided. And the only piece of the puzzle he left out had to do with the defendant's request that if he killed somebody he could use the boat. That's the only piece missing. And we get that piece when on October 30th Dan Lyons, knowing that Gerry is about to come in and discuss his case with the Government, tells [Gerry] you must tell the complete truth. He threatens him with the lie detector test and he says you have to tell the complete truth, you cannot hold back.[88]

Thus, we must weigh the impact of this statement, in light of the rest of the State's evidence, mindful of the credence that the jury may have accorded it. But, in the context of this ten-week trial, this statement was harmless when measured against the strength of the total evidence against Capano, despite the State's reliance on it. Moreover, we discuss in subsection C-3 the trial court's instruction carefully limiting the purpose for which the lie detector references were admitted.

2. Untainted Evidence of Planning

Having identified the potentially tainted portion of Gerry's testimony, we next determine the extent to which "the evidence exclusive of the improperly admitted evidence is sufficient to sustain a conviction."[89] We must

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[88] Tr. of 1/13/99, at 66 (State's Closing Argument).

[89] *Johnson v. State*, Del. Supr., 587 A.2d 444, 451 (1991) (internal quotation marks omitted).

therefore determine whether, excluding Gerry's testimony that Tom had asked to borrow Gerry's boat in the event that Tom had to "do something to" two extortionists, the State presented sufficient untainted evidence of planning to support a conviction for first degree murder.[90] The State's theory, as developed in its closing argument, was that Tom's conversations with Gerry about extortionists were merely the beginning of the evolution of a plan to kill Fahey.[91]

Even though Capano offered innocent explanations in some instances, we conclude that a rational jury could have convicted Capano based on the following evidence of planning and motive: (1) Capano's purchase of a large cooler in April 1996; (2) his purchase of the lock and chain that he used to secure the cooler top; (3) his purchase of a gun through Debby MacIntyre in May 1996; (4) his immediate concealment of Fahey's death and disposal of her body; and (5) evidence that Fahey sought to end her romantic involvement with Capano and began dating another person early in 1996.

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[90] As the State acknowledged in its closing, because the State has no direct evidence of Capano's actions on the night of Fahey's death, the State must prove that Capano intentionally caused Fahey's death by proving that Capano planned her death in advance. Tr. of 1/13/99, at 13-14 ("I'm not going to stand here today and tell you we know exactly how Anne Marie Fahey physically died that evening. What we did say we would prove . . . is that starting at least as early as February 1996 the defendant took steps to prepare himself for the possibility that he would kill Anne Marie Fahey.").

[91] Tr. of 1/13/99, at 13-14 (State's Closing).

First, the jury heard evidence that Capano purchased a very large, 162-quart cooler on April 20, 1996.[92] The State presented evidence that Capano made this purchase at approximately the same time that Fahey began to distance herself from him and to become closer to Michael Scanlon.[93]

Second, the jury heard evidence that, at some point early in 1996, Capano purchased the lock and chain that he used to secure the cooler containing Fahey's body. Although Capano presented innocent explanations for these purchases, the State vigorously attacked these explanations in its rebuttal and closing. Capano testified that, around January 1996, he purchased a twelve-foot length of chain from a neighborhood hardware store to increase the traction of his car tires during the winter.[94] The State argued in its closing that it would make no sense for Capano to purchase only twelve feet of chain, without hooks, for this purpose.[95] In addition, the State presented testimony that the hardware stores in Capano's neighborhood had no record of "purchases of chain over eight feet long from January of '96 through June 28, 1996."[96]

Capano also testified that he purchased the lock early in 1996 because someone had broken into his locker at his

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[92] Tr. of 12/16/98, at 46-48 (Tom Capano); Tr. of 12/2/98, at 85 (John O'Neill).

[93] Tr. of 11/3/98, at 34-35, 40 (Dr. Sullivan).

[94] Tr. of 12/22/98, at 65-66; Tr. of 12/29/98, at 102-04.

[95] Tr. of 1/13/99, at 74-75.

[96] Tr. of 1/7/99, at 74-76.

country club and because the club president had issued a letter advising members to purchase locks for their lockers.[97] In rebuttal, the State presented testimony from several witnesses refuting this testimony. These witnesses testified that Capano's country club did not issue a letter advising members to purchase locks for their lockers.[98] From the State's evidence, the jury could reasonably infer that Capano purchased the lock and chain at approximately the same time as he purchased the cooler, as part of his overall plan to kill Fahey and to dispose of her body at sea.[99]

Third, Deborah MacIntyre testified that Capano asked her to purchase a gun for him in April 1996 – at approximately the same time that Capano purchased the cooler.[100] Although MacIntyre was unable to purchase the gun for him at that point, she testified that Capano renewed his request in May 1996.[101] After MacIntyre agreed to this second request, Capano drove her to a gun shop and she purchased a handgun. MacIntyre testified that she immediately gave the handgun to Capano and

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[97] Tr. of 12/22/98, at 66.

[98] Tr. of 1/7/99, at 32, 38, 41, 46-48.

[99] In closing argument the State emphasized that the purchases of the cooler, the lock, and the chain were key pieces of evidence that Capano planned long before June 27, 1996 to kill Fahey. Tr. of 1/13/99, at 14-16.

[100] Tr. of 11/18/98, at 73-74.

[101] Tr. of 11/18/98, at 77-79, 83-84, 90-91. It is worth noting that Tom returned the handgun he borrowed from Gerry between one and two months after he borrowed it in February or March of 1996. Tr. of 11/9/98, at 18-19 (Gerry Capano); Tr. of 12/16/98, at 66-67 (Tom Capano).

claims not to have seen it again.[102] From evidence of this transaction, the jury could infer that Capano sought to purchase a gun that could not be traced directly to him – once again, as part of his plan to kill Fahey.

Fourth, the State presented substantial evidence that, immediately after Fahey died, Capano concealed her death and disposed of her body and other physical evidence. Capano testified that, at about 11:35 p.m., after he abandoned his attempts to revive Fahey after the "accident," he retrieved the cooler from a crawlspace and placed Fahey's body inside.[103] At this point, he also retrieved a bottle of Clorox to remove the bloodstains on the loveseat.[104] Within approximately twenty minutes of Fahey's death, Capano drove to Fahey's nearby apartment to make a "star-69" call from her phone and to leave a gift and some perishable groceries.[105]

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[102] MacIntyre also testified that in February 1997, Capano prepared a false story for her to tell investigators to explain her purchase of the handgun: "I bought the gun for myself as self defense, and because there were a lot of young people in my home, I got nervous that someone might find it, and I threw it away in the trash." Tr. of 11/18/98, at 164-65, 172. It is worth noting that MacIntyre further testified that Capano told her: "I should tell them [the police] that I saw it [the cooler] at his house, and I commented about it, and he told me he had bought it for his brother's boat." Tr. of 11/18/98, at 173-74.

[103] Tr. of 12/21/98, at 197-98.

[104] Tr. of 12/22/98, at 23.

[105] Tr. of 12/21/98, at 200; Tr. of 12/22/98, at 20-22. "Star-69" is an automated service offered by local telephone companies by which a caller dials "*69" to receive the date, the time, and the number of the last incoming call to the telephone number.

On cross-examination, Capano conceded that these actions, which were taken within twenty minutes of Fahey's death, were designed to give the appearance that Fahey had been at home recently.[106] Capano testified that he knew that Fahey was not going to work the next day,[107] and thus knew that her co-workers would be unaware of her disappearance until the following Monday. At 12:05 a.m. on June 28, 1996, approximately thirty minutes after Fahey's death, Capano also made a call to the voice mail system at his law firm "to create an alibi that I was home" because he knew that the system recorded the time of incoming calls.[108] Thus Capano admits that he acted immediately and decisively to conceal his involvement in Fahey's death and to create an alibi for himself. This admission is consistent with planning, and it supports a reasonable inference that, before June 27, 1996, Capano had planned Fahey's death.[109]

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[106] Tr. of 12/30/98, at 20.

[107] Tr. of 12/21/98, at 180-82.

[108] Tr. of 12/22/98, at 42-43; Tr. of 12/30/98, at 20.

[109] *Cf. Hanrahan*, 933 F.2d at 1339-40:

> Homer's own testimony goes a long way in meeting the State's burden and, in view of the source, must be viewed as having a more detrimental impact upon his defense than Michael's statements. *See Morrison v. Duckworth*, 929 F.2d 1180 (7th Cir.1991) (purported constitutional error held harmless when defendant's own statements admitted elements of crime); *see also Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 1257, 113 L. Ed. 2d 302 (1991) (" 'The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct.' ") (quoting

Similarly, Capano's efforts to destroy physical evidence of Fahey's death are consistent with planning. By about 5:00 p.m. on Saturday, June 28, 1996 – after Thomas and Gerry Capano returned to Wilmington from disposing of Fahey's body at sea – Thomas had transported the stained loveseat from his great room to a dumpster at a construction site run by his family.[110] His brother, Louis Capano, testified that Thomas asked him to have the dumpster emptied on Monday, July 1, 1996.[111] On June 29, 1996, less than one day after Fahey's death, Thomas placed the stained rug from his great room and various cleaning materials into a dumpster at a hotel in New Jersey owned by his family's business.[112] Because Capano effectively destroyed most of the physical evidence connecting him with Fahey's death in a relatively short time span, the jury could reasonably infer that his actions were the product of a pre-arranged plan to conceal her death.

Fifth, the State presented evidence that Fahey sought to end her romantic involvement with Capano in January

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Bruton v. United States, 391 U.S. 123, 140, 88 S. Ct. 1620, 1630, 20 L. Ed. 2d 476 (1968) (White, J., dissenting)).

[110] Tr. of 12/22/98, at 93-97. Additionally, Capano also provided Gerry with an innocent explanation for their trip to Stone Harbor in the event that Gerry was questioned by police. Tr. of 12/22/98, at 94.

[111] Tr. of 11/13/98, at 14-19. Louis also testified that he "saw something that could have been a sofa or a chair" in one of the dumpsters at the construction site. *Id.* at 16.

[112] Tr. of 12/22/98, at 96-101. In addition, Louis Capano testified that Tom admitted to putting his loveseat and some of Fahey's personal belongings in a dumpster belonging to the Capanos' construction company. Tr. of 11/13/98, at 14-15.

and February of 1996.[113] The State also presented evidence that Capano did not want the relationship to end and that he was upset about Fahey's attempts to break things off between them.[114] This evidence supports the State's theory that Capano had a motive to kill Fahey because she rejected him and started to date another man.[115]

3. The Trial Judge's Limiting Instructions

We also note that the trial judge twice issued limiting instructions – once during Lyons' testimony and once in the final jury charge – regarding the jury's use of the lie detector evidence in their deliberations.[116] These instructions limited the jury's consideration of the contested testimony and thus reduced the prejudicial effect of the testimony. The fact that these limiting instructions tended to minimize the impact of the evidence is a factor to consider in this harmless error analysis.

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[113] Email message of 2/4/96 from Fahey to Capano (indicating that she had told Capano that she wanted to pursue only a platonic relationship with him); email message of 2/7/96 from Fahey to Capano ("I meant what I said on Sunday night about right now only being able to offer you my friendship . . . . "); Tr. of 11/3/98, at 34-35, 40 (Dr. Sullivan); Tr. of 10/29/98, at 10-12 (Dr. Johnson). The admission of these emails into evidence was stipulated to by the parties.

[114] Email message of 2/14/96 from Fahey to Capano ("Tommy, you scared me this weekend, starting with Friday and all the calls you placed. It really freaks me out when you call every half hour.").

[115] Tr. of 1/13/99, at 30-51 (State's Closing).

[116] *See supra* notes 14, 20, 27 and accompanying text.

Accordingly, we conclude that, although the totality of Gerry's testimony was critical to the State's case, the portion of Gerry's testimony that was tainted by Lyons' vouching testimony was not an indispensable or critical part of the State's case[117] and that the State presented ample untainted evidence of planning to support Capano's conviction. On harmless error analysis, therefore, we hold that the erroneous admission of Lyons' testimony concerning Gerry's polygraph test and his improper vouching did not substantially prejudice the defense and that admission of this testimony does not warrant a reversal of Capano's conviction and sentence.[118]

IV. Hearsay Testimony by Fahey's Psychotherapists and Friends

The State presented the testimony of three of Fahey's psychotherapists: a psychiatrist, Neil Kaye, M.D.; and

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[117] This is true even though the State, in summation, referred to the importance of Lyons' testimony. Tr. of 1/13/99, at 15, 66, 207, 229. That reference must be viewed in light of the reality that the State had ample other evidence without Lyons' testimony. Compare the present case with *Barrow v. State*, Del. Supr., 749 A.2d 1230, 1246-47 (2000), in which we reversed a conviction because the improper statement was "particularly important to the State's effort to prove intentional killing," and provided a "necessary link" in the State's case.

[118] For the purposes of Capano's federal due process claim on this issue, *see Dowling v. United States*, 493 U.S. 342, 353-53, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990) (asserting that improper admission of evidence violates due process if it "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions' ") (citations omitted).

two psychologists, Dr. Michele Sullivan and Dr. Gary Johnson. For the most part, this testimony related to two primary subject areas: the genesis and treatment of Fahey's emotional difficulties, including her eating disorder, and Fahey's relationship with Capano, including descriptions of specific incidents during the relationship.[119] The State also presented the testimony of Fahey's sister and six of Fahey's friends. Like the psychotherapists, these witnesses testified about their conversations with Fahey concerning Fahey's relationship with Capano

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[119] For example, Dr. Kaye testified that "[Fahey] was fearful of [Capano], was not convinced that he was ever going to let go. . . . " and that "she was genuinely fearful . . . that harm would come to her if she broke things off . . . because she was worried about rage and anger." Tr. of 10/27/98, at 33-34. Dr. Kaye also testified about Fahey's character and testified extensively about Fahey's eating disorder. Tr. of 10/27/98, at 22 ("She was someone who was very memorable . . . a very friendly, polite young woman"); *id.* at 29, 37-48. Similarly, Dr. Sullivan testified that Fahey sought to end her involvement with Capano because the relationship was "unhealthy" and because he was "incredibly controlling and possessive." Tr. of 10/29/98, at 17-18. In a similar vein, Dr. Sullivan testified that Fahey was concerned that Capano would have her kidnapped. Tr. of 10/29/98, at 36, 37. Dr. Johnson testified that Fahey was "terrified" because a prominent married man whom she was dating (that is, Capano) "had come to her apartment quite late at night . . . bolted the door shut" and yelled at her because she had started to date Scanlon. Tr. of 10/29/98, at 16. Dr. Johnson further testified that Fahey "felt very much controlled by" the man and that Fahey "began to want to pull away from that relationship, [but] that he was unwilling to let her do so." Tr. of 10/29/98, at 10, 13.

and her descriptions of several incidents involving Capano.[120]

In his initial briefs before this Court, Capano argued broadly that all of the testimony presented by Fahey's psychotherapists and friends is inadmissible under the hearsay rules. In his supplemental briefs and in his June 13, 2001 oral argument before the Court on this issue, however, Capano specified more carefully his hearsay arguments and the evidence to which each argument applies. The State argues that all of the disputed testimony is admissible under exceptions to the rule against hearsay and is cumulative of similar evidence that was admitted by stipulation. In any event, the State argues, if

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[120] For example, Fahey's sister, Kathleen Fahey-Hosey, read extensively from Fahey's diary, Tr. of 10/28/98, at 137-56, including the following passage: "I finally have brought closure to Tom Capano. What a controlling, manipulative, insecure jealous maniac." Tr. of 10/28/98, at 155-56. Fahey's friend, Jill Morrison, similarly testified that Fahey thought that Capano was trying to control her life, Tr. of 11/4/98, at 47, and that Capano was upset about Fahey's relationship with Scanlon. Tr. of 11/4/98, at 61-62 ("He [Capano] was upset and this was because she was dating Mike [Scanlon]"). Morrison also described several incidents indicating that Capano was vindictive and that he was determined to maintain his relationship with Fahey. Tr. of 11/4/98, at 53-62. Fahey's friend Siobhan Sullivan testified that Fahey called Capano "a possessive, controlling maniac." Tr. of 11/4/98, at 161. Fahey's friend Kim Lynch-Horstmann testified that in December 1995, Capano "would e-mail her at work all the time and they were kind of obsessive e-mails." Tr. of 11/6/98, at 98. Other friends testified extensively about Fahey's relationship with Capano, about Fahey's excessive neatness, and about her eating disorder.

there was error admitting this evidence, it was harmless error.

Capano raises several challenges to the trial court's admission of testimony by Fahey's psychotherapists and friends recounting her description of specific examples of Capano's conduct during their relationship and her characterization of Capano as "controlling" and "jealous." First, Capano argues that the psychotherapists' testimony on these topics is not admissible under the medical diagnosis exception to the hearsay rule in D.R.E. 803(4), raising a question of first impression concerning whether that exception applies to statements made for purposes of psychotherapy – as distinct from statements made for purposes of diagnosing physical ailments. Second, he argues that the statements to the psychotherapists and Fahey's similar statements to her friends are not admissible because this testimony is a "statement of memory or belief" by Fahey and therefore does not fall within the state of mind hearsay exception. Third, Capano argues that Fahey's hearsay statements concerning her fear of Capano, although admissible under the state of mind exception, should not have been admitted during the State's case-in-chief. Capano contends that the State was not permitted to present this testimony until the defense had presented evidence or raised an affirmative defense making her state of mind relevant. Finally, Capano argues that the admission of this hearsay testimony violated his federal constitutional right to confront the witnesses against him.

We focus first in Subsection A on the question whether, and to what extent, the statements of both Fahey's friends and psychotherapists are admissible

under the state of mind exception of D.R.E. 803(3). In Subsection B, we consider whether the erroneous admission of statements under this exception was harmless error. Finally, in Subsection C, we deal separately, and alternatively, with the question whether the testimony of the psychotherapists is also admissible under the medical diagnosis or treatment exception of D.R.E. 803(4).

Claims alleging that the Superior Court erred in admitting evidence are subject to review in this Court to determine whether the trial court abused its discretion.[121] Where the trial court determines that the probative value of evidence is not "substantially outweighed by the danger of unfair prejudice" under Rule 403, this Court's review is necessarily deferential because "the trial judge is in a unique position to evaluate and balance the probative and prejudicial aspects of the evidence."[122] Claims alleging the infringement of a constitutionally protected right are subject to *de novo* review in this Court.[123]

A. Admissibility of Hearsay Testimony by Fahey's Psychotherapists and Friends under the State of Mind Exception

In challenging the admission of the hearsay testimony presented by Fahey's psychotherapists and friends, Capano raises two related issues. First, he argues that certain of the statements do not fit within the hearsay

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[121] *See Williamson v. State*, Del. Supr., 707 A.2d 350, 354 (1998).

[122] *Smith v. State*, Del. Supr., 560 A.2d 1004, 1007 (1989).

[123] *See id.*

exception for statements of the declarant's then-existing state of mind. This issue centers on the elements of Rule 803(3), particularly the provision excluding "statement[s] of memory or belief to prove the fact remembered or believed." Second, he argues that the trial court erroneously admitted Fahey's statements of her fear of Capano during the State's case-in-chief because the State may present evidence of the victim's fear of the defendant only in rebuttal after the defense raises an issue making the evidence relevant.[124] This issue assumes that Rule 803(3) is satisfied, and focuses on relevance and prejudice concerns under Rules 401 and 403.

The State contends that the contested hearsay evidence is admissible because it reveals Fahey's state of mind – that is, why Fahey wanted to end her relationship with Capano – and because it rebuts Capano's contention that they had a good ongoing relationship.[125] According to the State, the hearsay evidence therefore supports the prosecution's theory that Capano formulated a plan to kill Fahey because she was attempting to break off their relationship.

Agreeing with the State, the Superior Court admitted the hearsay testimony under D.R.E. 803(3) because the

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[124] Capano's argument relies primarily on the rule set out in *State v. Porter*, Del. Super., 587 A.2d 188, 193 (1990).

[125] The prosecution thus argued to the trial court that "We would have to raise . . . that Miss Fahey would not have just walked off and gone to Mexico or gone to Puerto Rico or gone somewhere. These are things, because we do not have a body we have to establish them, and it is those things that also make relevant all of the state of mind testimony." Tr. of 11/2/98, at 155.

court viewed the change in the relationship between Fahey and Capano as relevant to Capano's motive to murder Fahey and, consequently, to the State's theory of the case. The trial court thus concluded that "[Fahey's] state of mind becomes important"[126] and that the hearsay evidence was admissible evidence on that issue. The trial court was concerned with both the State's need to present a coherent theory of the case and the fact that Capano had raised an accident defense during opening statements that the State needed to rebut.

1. Whether Fahey's Statements Fall within the State of Mind Exception

D.R.E. 803(3) provides a hearsay exception for:

> A statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of the defendant's will.[127]

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[126] Tr. of 11/2/98, at 176-177.

[127] This Court has established five factors to be applied in deciding whether a hearsay statement is sufficiently trustworthy to be admissible under the state of mind exception. *See Derrickson v. State*, Del. Supr., 321 A.2d 497, 503 (1974). Specifically, the statement (1) must be relevant and material; (2) must relate to an existing state of mind of the declarant at the time of its making; (3) must have been communicated in a natural manner; (4) must be made under circumstances dispelling suspicion; and (5) must contain "no suggestion of

The exclusion of statements of "memory or belief" derives from the United States Supreme Court's decision in *Shepard v. United States*, in which a witness testified that the victim had stated, "Dr. Shepard [the defendant] has poisoned me."[128] The *Shepard* Court held that this declaration was not admissible under the state of mind exception because it was a statement of "memory."[129] Specifically, the Court stated:

> Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored.
>
> The testimony now questioned faced backward and not forward. This at least it did in its most

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sinister motives." *Id.*; *see also Forrest v. State*, Del. Supr., 721 A.2d 1271, 1275-76 (1999). Although *Derrickson* was decided prior to the adoption of the current version of the Delaware Rules of Evidence, this Court has reaffirmed the use of these factors in determining whether a statement is admissible under the state of mind exception. *See Forrest*, 721 A.2d at 1276.

[128] *See Shepard v. United States*, 290 U.S. 96, 98, 78 L. Ed. 196, 54 S. Ct. 22 (1933); *see also* 3 Federal Rules of Evidence Manual 1656 (7th ed. 1998) (referring to "*Shepard* exclusion," citing Advisory Committee notes to Fed. R. Evid. 803(3)). The state of mind hearsay exception was developed in *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 295-97, 36 L. Ed. 706, 12 S. Ct. 909 (1892), in which the Supreme Court held that statements by an insured that he intends to take a trip with another person is admissible as evidence that the insured completed the acts intended. The *Shepard* Court noted that the ruling in *Hillmon* "marks the high-water line beyond which courts have been unwilling to go." *Shepard*, 290 U.S. at 105.

[129] *Shepard*, 290 U.S. at 106.

> obvious implications. *What is even more important, it spoke to a past act, and more than that, to an act by some one not the speaker.* Other tendency, if it had any, was a filament too fine to be disentangled by a jury.[130]

Following *Shepard* and the text of Rule 803(3), a statement that "I am afraid" is admissible. This statement fits within the justification for the hearsay exception, namely, the declarant's "unique perspective into his own feelings and emotions."[131] Similarly, the statement that "I am afraid *of D*" is generally admissible.[132]

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[130] *Id.* (emphasis added); *see also United States v. Donley*, 3d Cir., 878 F.2d 735, 737-38 (1989) (allowing testimony "that the deceased had a plan to convince her husband that they were being evicted, and that she acted shortly before her death to further her plan" because it was offered "to show the existence of the deceased's plan to move out of the [military] base apartment and separate from her husband").

[131] 3 Federal Rules of Evidence Manual, *supra*, at 1656.

[132] *See, e.g., Martinez v. State*, Tex. Crim. App., 17 S.W.3d 677, 688 (2000) ("Veronica's statement that she was afraid of appellant was a statement of the declarant's then existing state of mind, and therefore fell within the Rule 803(3) hearsay exception."); *State v. O'Neal*, 87 Ohio St. 3d 402, 721 N.E.2d 73, 84-85 (2000) ("[The victim's] statements that she was feeling stressed and was afraid of appellant were relevant to prove her intent to end the marriage. These statements were properly admitted as evidence under Evid. R. 803(3). . . . "); *State v. Brown*, Mo. Supr., 998 S.W.2d 531, 546 (1999) ("The state offered this testimony [that the victim was afraid of the defendant] to show [the victim's] state of mind regarding her fears about [the defendant] and not to show the truth of the matter being asserted."), *cert. denied*, 528 U.S. 979, 145 L. Ed. 2d 337, 120 S. Ct. 431 (1999). *But see Com. v. Wilson*, 427 Mass. 336, 693 N.E.2d 158, 170 (1998) (finding that trial court erroneously admitted hearsay testimony recounting a murder victim's statements "that [the

The case is different with respect to a statement that "I am afraid of D *because he is a maniac*" or "I am afraid of D *because he threatened me*" or "I am afraid of D *because he is going to kill me.*"[133] Such statements are simply perceptions or beliefs a victim has of events, and their admission is not justified under the rationale for the state of mind exception. There is substantial authority holding that such statements of memory or belief are not admissible under Rule 803(3).[134] Thus, the "statement of the

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victim] was afraid of the defendant, and that [the victim] 'couldn't handle' the defendant"); *United States v. Brown*, 160 U.S. App. D.C. 190, 490 F.2d 758, 776 (1974) ("For example, the simple statement 'I am afraid' contains no extraneous factual matters; and, if the declarant's state of mind is at all relevant, there is very little conceivable prejudice to the defendant. However, the statement 'I am afraid of D (defendant)' is more dangerous.").

[133] *See Brown*, 490 F.2d at 775-76 ("In a trial for criminal assault, the statement 'I am afraid of D (defendant)' made by the victim might be very relevant on the issue of self-defense. However, the statement 'I am afraid of D – he beat me last week' is so close to the ultimate issue at hand that there is a greater danger that the jury will misuse the statement and assume some truth to the allegation of past conduct on the part of D.").

[134] *See, e.g., State v. Fulminante*, 193 Ariz. 485, 975 P.2d 75, 88 (1999) ("But two of [the victim's] contested hearsay statements, 'He's going to kill me' and 'I'm afraid he's going to kill me,' directly report [the victim's] statement of belief about Defendant's future conduct and thus violate the rule.") (citations omitted); *State v. Phillips*, 194 W. Va. 569, 461 S.E.2d 75, 91 (1995) ("Even if the declarations were relevant to show the state of mind of the wife, the statements . . . go much further and reveal details about extramarital affairs. The latter statement is not reflective of future intentions, but is a fact remembered and is specifically excluded from the exception."); *State v. Hawn*, 138 Ohio App. 3d 449, 741 N.E.2d 594, 601 (2000) (noting that in

declarant's then existing state of mind" would not include anything but the assertion that "I am afraid." The *reasons* why she was afraid cannot be characterized as assertions (*i.e.*, "statements") of her state of mind.[135]

The State argues that the hearsay evidence admitted against Capano nevertheless falls within the state of mind

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Ohio admissibility is limited to "testimony . . . reflecting the state of mind of the victim, but not the reasons underlying that state of the mind") (citations omitted); *State v. Garcia*, 334 S.C. 71, 512 S.E.2d 507, 509 (1999) ("While their testimony presents circumstantial evidence of the decedent's fear of appellant and concern for her safety, the testimony improperly reveals the reason for her state of mind (i.e., that appellant had kicked and threatened to kill her).") (citation omitted); *United States v. Fontenot*, 9th Cir., 14 F.3d 1364, 1371 (distinguishing "I'm scared" from "I'm scared because [someone] threatened me"; holding that the latter is a statement of belief that is not admissible), *cert. denied*, 513 U.S. 966, 130 L. Ed. 2d 343, 115 S. Ct. 431 (1994); *United States. v. Liu*, 5th Cir., 960 F.2d 449, 452 (1992) ("Evidence of Liu's fear was admitted. Properly excluded were the alleged reasons for that fear."); *id.* ("If the reservation in the text of the rule is to have any effect, it must be understood to narrowly limit those admissible statements to declarations of condition – 'I'm scared' – and not belief – I'm scared because Galkin threatened me.") (quoting *United States v. Cohen*, 5th Cir., 631 F.2d 1223, 1225 (1980)), *cert. denied*, 506 U.S. 957 (1992).

[135] This interpretation of "statement" in Rule 803(3) finds support in the United States Supreme Court's narrow reading of this term in *Williamson v. United States*, 512 U.S. 594, 129 L. Ed. 2d 476, 114 S. Ct. 2431 (1994). In that case, the Court held that a statement against penal interest was admissible under Rule 804(b)(3) but that the "narrative" or "collateral" portions of the statement were not. *See id.* at 599-600. This holding was based partly on the definition of a "statement" as an "oral or written assertion," *see* Rule 801(a), as opposed to a "report or narrative."

exception. The State also argues that, by stipulating to their admission before trial, Capano waived any hearsay objections with respect to Fahey's diary, the Capano-Fahey emails, and testimony by Kim Lynch-Horstmann. We address this fact, along with the State's argument that the trial court appropriately limited the jury's consideration of the evidence to "the state of mind of Miss Fahey at or about the time when the alleged incidents occurred," as part of the harmless error analysis below.

The State maintains that it did not offer the contested testimony to prove the "fact remembered or believed" – *i.e.*, that Capano actually engaged in the conduct described or that Capano is a controlling, jealous person. Instead, the State argues that it offered the testimony to prove that Fahey *believed* that these things were true and, as a result, wanted to end her relationship with Capano. The State therefore argues that the testimony of Fahey's friends and psychotherapists does not fall within the definition of hearsay because the testimony was not offered to prove that the events and opinions described were actually true. Under the State's theory, to the extent that the proffered testimony is prejudicial, the trial court (as the court did in this case) must determine whether the testimony is admissible under the balancing test of D.R.E. 403.

Although one could plausibly interpret the state of mind exception to authorize the admission of testimony of memories or beliefs for some purpose other than

proving the fact remembered or believed,[136] this interpretation places a difficult burden on the jury. In particular, the jury must confine its consideration of the declarant's memories and beliefs, including memories of potentially serious misconduct by the defendant, to the limited issue of a person's state of mind. Under these circumstances, it is difficult for the jury to make such an abstract distinction, even when properly defined by the trial court's limiting instructions.[137]

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[136] *See State v. Alston*, 341 N.C. 198, 461 S.E.2d 687, 704 (1995) ("[A] murder victim's statements falling within the state of mind exception to the hearsay rule are highly relevant to show the status of the victim's relationship to the defendant. . . . Contrary to the defendant's assertions, we have long declined to follow *Brown's* strict rule.") (citation omitted), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100, 116 S. Ct. 1021 (1996); *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876, 895-97 (1991) (admitting taped statement by murder victim, including descriptions of specific incidents and threats, under state of mind exception); *State v. Jones*, 137 N.C. App. 221, 527 S.E.2d 700, 704-05 (2000) ("These statements, although entirely factual, in effect showed the decedent's state of mind when she uttered them and were therefore admissible under Rule 803(3)."") (discussing *State v. Mixion*, 110 N.C. App. 138, 429 S.E.2d 363 (1993)), *review denied*, N.C. Supr., 544 S.E.2d 235 (2000); *see also State v. Phillips*, 194 W. Va. 569, 461 S.E.2d 75, 98 (1995) (Workman, J. dissenting) (suggesting that statements showing that the victim thought her husband was having affairs and that she intended to divorce him were not hearsay because they suggest defendant's motive to kill his wife, and it was irrelevant whether defendant was actually having affairs).

[137] *Cf. Brown*, 490 F.2d at 777 ("In extreme cases, where the relevance balance is clearly to be struck against the admission of the testimony, the limited utility of the special instruction has been repeatedly recognized by the courts.") (footnote omitted); *Shepard*, 290 U.S. at 103 (commenting on the efficacy of a

In practice, the broad reading of the state of mind exception proposed by the State relies heavily on the balancing test of Rule 403 to ensure that the defendant is not unfairly prejudiced by testimony describing the declarant's memories or beliefs. Thus, where the danger of unfair prejudice from the admission of these statements substantially outweighs the probative value of the statements, the trial court may exclude the statements under D.R.E. 403. This reliance on Rule 403 presents a potential problem because it replaces hearsay limitations with the more lenient Rule 403 prejudice balance. The hearsay rule is designed to exclude statements untested by cross-examination that are insufficiently reliable due to possible defects in the declarant's memory, perception or veracity. The Rule 403 analysis, on the other hand, assumes that these reliability concerns are overcome and focuses on balancing the effects of the statement on the jury.

In view of the wide range of untested, and potentially unreliable, out-of-court statements that would be admissible under the State's broad interpretation of the state of mind exception, we conclude that Rule 803(3) authorizes the admission of hearsay statements by Fahey to her friends and psychotherapists[138] reflecting her fear

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limiting instruction, the Court stated that "The reverberating clang of those accusatory words would drown all weaker sounds"); *see also id.* at 106 ("The testimony now questioned faced backward and not forward. This at least it did in its most obvious implications. . . . Other tendency, if it had any, was a filament too fine to be disentangled by a jury.").

[138] In Subsection C we deal with our separate, alternative holding under D.R.E. 803(4) regarding the admissibility of

of the defendant (that is, her state of mind), but not the memories or beliefs giving rise to that fear.

Applying the above analysis to the present case, we conclude that Fahey's description of specific events involving Capano and her opinion of Capano reflect not on Fahey's "state of mind," but on her beliefs and memories of facts as she expressed them to her friends and psychotherapists.[139] For example, Jill Morrison testified that Fahey told her about being locked in a garage by Capano while they argued, an experience Fahey found "extremely frightening."[140] The narrative of this incident

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Fahey's statements to her psychotherapists under the medical diagnosis or treatment exception.

[139] *See Fulminante*, 975 P.2d at 85 ("The statement must be limited to a declaration showing the state of mind and not include a description of the factual occurrence that engendered that state of mind."). Because we have concluded that the specific incidents that Fahey described to her friends and psychotherapists are not admissible under the state of mind exception, there is no need to address the limitations on the admissibility of bad act evidence established in D.R.E. 404 and in *Getz v. State*, Del. Supr., 538 A.2d 726, 734 (1988) or the prejudice balance under D.R.E. 403.

[140] The state of mind exception authorizes the admission of a "statement of the declarant's *then existing* state of mind, emotion, sensation or physical condition." D.R.E. 803(3) (emphasis added). To be admissible under Rule 803(3), the statement must reflect the declarant's state of mind *at the time that the statement is made.* Thus, a statement reflecting the declarant's memory of a past state of mind cannot meet this contemporaneity requirement. For example, Fahey's statement to Morrison that she was frightened during the garage incident is not admissible as a then existing state of mind, whereas Fahey's statements that she was upset with or afraid of Capano at the time of the statement is admissible under the exception.

is not a state of mind – it is a memory of an event – and does not fall under Rule 803(3) as we interpret that rule.[141] In contrast, Fahey's statements that she was upset, that she was afraid of Capano, or that she intended to break off her relationship with Capano are admissible as statements revealing Fahey's emotional or mental state.[142]

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[141] The same analysis applies to Dr. Johnson's and Dr. Sullivan's testimony recounting Fahey's description of various incidents during the course of Fahey's relationship with Capano. For example, Dr. Sullivan testified that "apparently Mr. Capano got into the apartment and became very angry and he threatened to take away gifts, the air conditioner, things he felt he did not want to be present while she might be dating somebody else." Tr. of 11/2/98, at 44-45. Fahey's description of this event to Dr. Sullivan reflects Fahey's memory of the event, rather than her existing mental or emotional state at the time of the conversation.

[142] For example, Jennifer Bartels-Houghton testified, regarding emails Capano sent: "She got upset and said that this man would not get the hint, that she did not want to be more than friends, and he was bothering her, sending her emails and asking her to go out to dinner." Dr. Kaye testified: "She was still fearful of him, was not convinced that he was ever going to let go, but in her own mind, she had wanted that to be over a long time ago." Tr. of 10/27/98, at 33. These statements concerning the deterioration of their relationship are relevant to motive and intent. *See Gattis v. State*, Del. Supr., 637 A.2d 808, 818 (1994) ("In a prosecution for homicide arising out of a marital or romantic relationship, evidence of previous discord between the victim and the defendant is clearly material to issues of motive and intent."); *see also Donley*, 878 F.2d at 738 ("The government properly sought to persuade the jury to infer from her statements that she had such a plan and, in turn, to infer from that plan and the defendant's awareness of it that he had a motive for murder other than the one he claimed."); *People v. Fisher*, 449 Mich. 441, 537 N.W.2d 577, 582 (1995) ("Numerous

Accordingly, the evidence going solely to Fahey's state of mind was admissible. The portions of the testimony describing Fahey's beliefs or memories of facts were inadmissible.

2. Whether Statements Describing Fahey's Fear of Capano May be Presented in the State's Case-in-Chief

As discussed above, the statement "I fear Defendant" falls within the proper scope of Rule 803(3). Due to concerns over relevancy and prejudice, however, courts limit the admissibility of such statements by victims.[143] The concern is that a victim's statement that "I fear Defendant" leads to an inference that the defendant deserves to be feared.[144] Courts are wary of allowing jurors to draw

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prior cases have upheld the admissibility of evidence showing marital discord as a motive for murder, or as circumstantial evidence of premeditation and deliberation").

[143] *See* 3 Federal Rules of Evidence Manual, *supra*, at 1660 ("Exclusion, if it is to occur, must be under Rule 403. . . . "); 2 McCormick On Evidence § 276, at 230 (5th ed. 1999) ("If the statement is merely an expression of fear – i.e., "I am afraid of D" – no hearsay problem is involved, since the statement falls within the hearsay exception for statements of mental or emotional condition. This does not, however, resolve the question of admissibility.").

[144] *See Brown*, 490 F.2d at 776 ("It gives rise to the natural inference that there has been some past conduct on the part of the defendant to justify such a fear, *e.g.*, past beatings or threats, or even that the statement accurately reflects on defendant's state of mind and intentions."); *Com. v. Qualls*, 425 Mass. 163, 680 N.E.2d 61, 65 (1997) ("The principal danger in admitting evidence of a homicide victim's fear of the defendant or desire

this inference because it may be based on subjective impressions but have great impact.[145]

In light of these concerns, courts have developed limitations on the admissibility of statements describing the victim's state of mind. *United States v. Brown*, the leading case on this issue, requires that the trial court must find a "substantial degree of relevance to a material issue" or a "manifest need for such evidence" before the court may admit statements describing the victim's fear of the defendant.[146] While not limiting admissibility to any predetermined set of facts, *Brown* observed that statements of the victim's mental state are generally admissible only to rebut the defendant's claim of self-defense, suicide, or accidental death.[147] The majority of courts have adopted this rebuttal requirement in one form or

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to 'get' the defendant when there is no evidence of the defendant's awareness of the victim's state of mind is that the jury will consider the victim's statement of fear or intention, standing alone, as somehow reflecting on the defendant's state of mind rather than that of the victim.") (citing *Brown*, 490 F.2d at 766).

[145] *See* 2 McCormick on Evidence, *supra*, § 276 at 231 ("However, the most likely inference that jurors may draw from the existence of fear, and often the only logical inference that could be drawn, is that some conduct of the defendant, probably mistreatment or threats, occurred and caused the fear. The possibility of over-persuasion, the prejudicial character of the evidence, and the relative weakness and speculative nature of the inference, all argue against admissibility as a matter of relevance.") (footnotes omitted).

[146] *Brown*, 490 F.2d at 767, 774.

[147] *See id.* at 767.

another.[148] The holding of the Superior Court in *State v. Porter* that a victim's statements of fear of the defendant could come in under 803(3) "only . . . in rebuttal after

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[148] *See, e.g., State v. Parr*, 93 Wn.2d 95, 606 P.2d 263, 267 (1980); *State v. Christensen*, 129 Ariz. 32, 628 P.2d 580, 584 (1981) ("A victim's state of mind is only relevant when identity or the defense of accident, suicide or self-defense is raised."); *State v. Machado*, 111 N.J. 480, 545 A.2d 174, 178 (1988) ("There are exceptions in *Downey* relating to establishing that the decedent was not the aggressor, did not commit suicide and was not accidentally killed. . . . "); *State v. Baca*, 120 N.M. 383, 902 P.2d 65, 71 (1995) ("The state of mind of the victim of a crime commonly is a fact of consequence in issues of (1) self defense (rebutted by extrajudicial declarations of the victim's passive state of mind), (2) suicide (rebutted by statements inconsistent with a suicidal bent), and (3) accident (rebutted by victim's fear of placing self in way of such harm)."); *cf. Downs v. State*, Fla. Supr., 574 So. 2d 1095, 1098 (1991) (finding that victim's statements indicating a fear of the defendant were inadmissible because the statements were not offered "to prove or explain any subsequent acts of relevance" by the victim); *People v. Borrelli*, Colo. App., 624 P.2d 900, 903 (1980) ("Better-reasoned cases allow hearsay expressions of a victim's fear of a defendant only where the state of mind of the victim is clearly relevant to a material issue in the case."); *State v. Wauneka*, Utah Supr., 560 P.2d 1377, 1380 (1977) ("Pre-death hearsay statements of a victim in homicide cases are generally admissible when the defendant claims self-defense . . . [or] where the defense is that the death was accidental and that the victim was an aggressor."); *see also* 2 McCormick on Evidence, *supra*, § 267 at 232 ("Also, such statements [describing the victim's fear of the defendant] are admissible where the defense claims self-defense, suicide, or accidental death because . . . the decedent's fear helps to rebut aspects of the asserted defense.") (footnote omitted); 3 Federal Rules of Evidence Manual, *supra*, at 1660-61 (describing limitations on admission, noting that the paradigm use of a victim's statement of fear is to rebut a claim that the *victim* acted in a certain way).

evidence of accident, self-defense, suicide or extreme emotional distress has been presented by the defense" is broadly in line with this prevailing view.[149]

In *State v. Wood*, the Arizona Supreme Court upheld admission of "statements made by [the victim] about her fear of Defendant and her desire to end their relationship."[150] The rationale for admissibility was as follows:

> The statements about [the victim's] fear and desire to end the relationship helped explain Defendant's motive. The disputed trial issues were Defendant's *motive* and *mental state* – whether Defendant acted with premeditation or as a result of a sudden impulse. The prosecution theorized that Defendant was motivated by anger or spite engendered by [the victim's] termination of the relationship. [The victim's] statements were relevant because they showed her intent to end the relationship, which in turn provided a plausible motive for premeditated murder. In addition, [the victim's] statements were also relevant to refute Defendant's assertion that he and [the victim] had secretly maintained their relationship after July 4, 1989.[151]

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[149] *State v. Porter*, Del. Super., 587 A.2d 188, 193 (1990). Alongside this Court's *Derrickson* requirements, which apply to state of mind hearsay generally, the Superior Court in *Porter* applied "additional admissibility requirements . . . before hearsay evidence is to be admitted under D.R.E. 803(3) in a homicide prosecution." *Id.*

[150] *State v. Wood*, 180 Ariz. 53, 881 P.2d 1158, 1167 (1994), *cert. denied*, 515 U.S. 1147, 132 L. Ed. 2d 836, 115 S. Ct. 2588 (1995).

[151] 881 P.2d at 1167-68 (citations and footnotes omitted, emphasis in original). In *State v. Christensen*, 129 Ariz. 32, 628

It thus appears that *Wood* did not key admission solely to rebuttal of the defense case; rather, *Wood* recognizes the prosecution's need to present evidence that is material to the elements of its *prima facie* case.[152]

In a slightly different context, this Court has held that the State may introduce evidence of the defendant's prior bad acts in its case-in-chief only where the evidence is independently relevant to an issue or fact that the State

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P.2d 580, 584 (1981), the Court had earlier held that "[a] victim's state of mind is only relevant when identity or the defense of accident, suicide or self-defense is raised." *Wood* distinguishes the prior holding in *Christensen* by noting that *Christensen* "hold[s] merely that evidence of the victim's fear of the defendant is not relevant to prove the defendant's conduct or identity. . . . In the present case, by contrast, Defendant's conduct and identity were undisputed." *Wood*, 881 P.2d at 1167 (citation omitted).

[152] *See also Arizona v. Fulminante*, 193 Ariz. 485, 975 P.2d 75, 87-88 (1999) ("Even though Defendant did not claim at the second trial that he and [the victim] had a good relationship, [the victim's] dislike and fear of her stepfather are relevant, although perhaps minimally, to the issue of *motive*, and admission of her statements of dislike and fear were permitted under the rule.") (emphasis added, footnote omitted) (citing *Wood*, 881 P.2d at 1167-68); *Stoll v. State*, Fla. Supr., 762 So. 2d 870, 874 (2000) (noting that "the victim-declarant's state of mind may become an issue in the case" where it is relevant to an element of the crime in dispute or where it rebuts an argument of accident, self-defense, or suicide raised by the defendant); *but cf. State v. Phillips*, 194 W. Va. 569, 461 S.E.2d 75, 91 (1995) (noting that the defendant had not opened the door to the admission of a murdered wife's hearsay statement of her fear of her husband, the defendant, in the prosecution's case-in-chief because the defendant had not had an opportunity to present evidence that the marriage was a happy one).

must prove as part of its *prima facie* case.[153] Before admitting the contested evidence during the State's case-in-chief, the trial court must determine whether the evidence is sufficiently relevant to an element of the charged crime or whether the evidence must be presented in rebuttal after the defense raises an issue to which the evidence is relevant during its case-in-chief.

Following the cases discussed above, we conclude that a victim's statements of fear of the defendant are admissible (1) during the State's case-in-chief to prove the State's *prima facie* case or (2) during the State's rebuttal case to counter a defense theory that places the victim's own actions squarely at issue.[154]

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[153] *See Milligan v. State*, Del. Supr., 761 A.2d 6, 8 (2000) ("While the defense did acknowledge that 'late reporting' would be made an issue in its case and would be mentioned in its opening, 'late reporting' bore no reasonable relationship to an issue or ultimate fact to be proved in the State's case-in-chief."); *Cobb v. State*, Del. Supr., 765 A.2d 1252, 1254-55 (2001) (applying *Milligan*, 761 A.2d at 8); *see also Gattis*, 637 A.2d at 818 ("The court correctly ruled that evidence of prior bad acts directed to the victim could be presented only in rebuttal if the defendant testified concerning accident or lack of intent.").

[154] We note that some cases appear to depart from the rebuttal requirement, although with varying degrees of clarity about the rationale for the departure. In *Clay v. Com.*, 33 Va. App. 96, 531 S.E.2d 623, 626-27 (2000) (*en banc*), *aff'd*, 262 Va. 253, 546 S.E.2d 728 (2001), the court allowed admission of a victim's statements of fear of the defendant ostensibly to rebut the defendant's story of an accident. Citing *Brown*, the *Clay* court held that the evidence of fear and deteriorating relationship was admissible because "logically, a deceased's fear of an individual accused of murder is inconsistent with a claim that the events in question culminating in the death were the result of 'pure chance.' " *Clay*, 531 S.E.2d at 628. As pointed out in the dissent,

Applying this rule to the present case, we find that testimony describing Fahey's state of mind was relevant to prove (1) that Fahey sought to end her romantic involvement with Capano and (2) that Capano, as the spurned lover, therefore had a motive to kill her. Since this theory of admissibility is material to a disputed element of the State's *prima facie* case for first degree murder (that is, intent and/or premeditation), the State could properly present this evidence in its case-in-chief.[155] Thus, the trial court did not abuse its discretion

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however, the accident story was simply that the gun "just went off," a story that does not implicate the victim's state of mind in the direct sense contemplated by *Brown*. *See id.* at 634 ("No act or conduct of the decedent was at issue. Thus, the decedent's state of mind had no bearing on any issue to be decided by the jury.") (Benton, J. dissenting) (joined by Elder, J.). *See also State v. Garcia*, 334 S.C. 71, 512 S.E.2d 507, 508 (1999) (admitting evidence of victim's fear "because it tended to disprove appellant's contention the shooting was an accident; the victim's fear suggests appellant may have intended the shooting" although "Appellant offered no evidence at trial."); *State v. Alston*, 341 N.C. 198, 461 S.E.2d 687, 704 (1995) ("Contrary to the defendant's assertions, we have long declined to follow *Brown's* strict rule."), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100, 116 S. Ct. 1021 (1996).

[155] *See Gattis*, 637 A.2d at 818 (holding that "evidence of previous [marital] discord between the victim and the defendant is clearly material to issues of motive and intent"); *Donley*, 878 F.2d at 737-38 (holding that evidence of the victim's plan was admissible to show that she acted in conformity with her plan) (citing *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 36 L. Ed. 706, 12 S. Ct. 909 (1892)); *see also United States v. Hartmann*, 7th Cir., 958 F.2d 774, 783 (1992) (finding no plain error in admission of victim's statements of fear of the defendant in order to support prosecution's theory of the case).

by admitting during the State's case-in-chief hearsay evidence that was properly admitted under the state of mind exception.

3. Confrontation Clause Analysis of Hearsay Statements Admitted under the State of Mind Exception

The next question is whether the Confrontation Clause of the Sixth Amendment operates to bar admission of the hearsay statements by Fahey that are admissible under the state of mind exception.[156] The Confrontation Clause provides defendants in criminal cases with the right to confront witnesses who testify against them.[157] Where hearsay statements by an unavailable declarant are admitted into evidence, the accused has no opportunity to test the veracity of those statements through cross-examination.[158] Before the State may

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[156] The hearsay testimony concerning Fahey's beliefs about Capano and her memories of specific incidents involving Capano is, as noted above, inadmissible under the state of mind exception. We therefore assume that this evidence does not meet the requirements of the Confrontation Clause. We address in Subsection B whether the admission of this evidence was harmless beyond a reasonable doubt.

[157] *See* U.S. Const. Amend. VI, cl. 3.

[158] *See Maryland v. Craig*, 497 U.S. 836, 845, 111 L. Ed. 2d 666, 110 S. Ct. 3157 (1990) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."); *see also Lilly v. Virginia*, 527 U.S. 116, 123-24, 144 L. Ed. 2d 117, 119 S. Ct. 1887 (1999) (plurality opinion) (same).

present hearsay statements against the accused in a criminal prosecution, the State[159] must therefore establish (1) that the hearsay was admitted under a "firmly rooted" exception to the hearsay rule or (2) that the contested statements possess "particularized guarantees of trustworthiness 'such that adversarial testing would be expected to add little, if anything, to the statements' reliability.' "[160]

Where hearsay testimony is admitted pursuant to a "firmly rooted" exception, it is not necessary to make a particularized assessment of the statement's reliability.[161] To determine whether an exception to the hearsay rule is "firmly rooted," the Court must find that the statements admissible under the exception are invariably trustworthy. This finding depends in part on the longevity and widespread acceptance of the hearsay exception by courts and legislatures.[162]

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[159] *See Lilly*, 527 U.S. at 137 (observing that the burden is on the government to establish the statement's reliability).

[160] *Barrow v. State*, Del. Supr., 749 A.2d 1230, 1244 (2000) (quoting *Lilly*, 527 U.S. at 125).

[161] *See Bourjaily v. United States*, 483 U.S. 171, 183, 97 L. Ed. 2d 144, 107 S. Ct. 2775 (1987).

[162] *See Lilly*, 527 U.S. at 126 ("In light of 'longstanding judicial and legislative experience,' [the exception] 'rest[s] [on] such [a] solid foundation that admission of virtually any evidence within [it] comports with the substance of the constitutional protection.' ") (quoting *Idaho v. Wright*, 497 U.S. 805, 817, 111 L. Ed. 2d 638, 110 S. Ct. 3139 (1990) and *Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980)) (internal quotation marks and citations omitted); *Bourjaily*, 483 U.S. at 183.

Based on the longstanding judicial precedent establishing the propriety of admitting statements under the state of mind exception,[163] this Court declared the state of mind exception, as defined in *Derrickson*, to be "firmly rooted" for purposes of the Confrontation Clause.[164] Following this established jurisprudence, we find that D.R.E. 803(3) is a firmly rooted hearsay exception under the Confrontation Clause.[165] We therefore conclude that the

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[163] This exception was first discussed by the United States Supreme Court in *Mutual Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285, 295-97, 36 L. Ed. 706, 12 S. Ct. 909 (1892), and the exception first appeared in Delaware in 1923. Furthermore, the state of mind exception is recognized in at least forty-four states. *See Forrest v. State*, Del. Supr., 721 A.2d 1271, 1277 (1999).

[164] *See Forrest*, 721 A.2d at 1277; *see also Derrickson v. State*, Del. Supr., 321 A.2d 497, 503 (1974) (observing that the state of mind exception is "a universally recognized exception to the hearsay rule"). Although the victim's statements of fear of the defendant may be admitted only if relevant to the State's *prima facie* case or if relevant to rebut an affirmative defense, this limitation is concerned primarily with controlling the risk of improper inferences about the defendant's character – a concern that is not relevant to Confrontation Clause analysis. In contrast, the *Derrickson* requirements are expressly designed to ensure that the statements are sufficiently trustworthy to warrant admission against a defendant in a criminal case.

[165] Even if Fahey's statements concerning her fear of Capano did not fall within a firmly rooted hearsay exception, we find that the statements admissible under Rule 803(3) possess such "particularized guarantees of trustworthiness" that their admission does not violate Capano's rights under the Confrontation Clause. *See Lilly*, 527 U.S. at 124-25; *Wright*, 497 U.S. at 820-21 (holding that testimony must be shown to be so trustworthy that "adversarial testimony would add little to its reliability"). Fahey's statements in her diary (stipulated as admissible) and her conversations with her psychotherapists

admissible hearsay testimony concerning Fahey's emotional state is admissible under a firmly rooted hearsay exception and satisfies the requirements of the Confrontation Clause.

B. Admission Under the State of Mind Exception of Fahey's Statements of Facts Remembered or Believed is Harmless Error

The hearsay testimony recounting Fahey's statements is found in the testimony of a number of witnesses. These include a psychiatrist and several psychologists[166] and also several of Fahey's friends.[167] In addition, Fahey's emails to Capano were read to the jury,[168] as were portions of Fahey's diary, which were read from the stand by Fahey's sister, Kathleen Fahey-Hosey.

As we have found, certain of the statements made by Fahey to her friends should not have been admitted under the state of mind exception because they recounted facts remembered or believed. Similarly, analyzed under

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and friends were made under circumstances that tended to establish that they were candid and made without a motive to fabricate. *See Wright*, 497 U.S. at 821-22 (citing *State v. Robinson*, 153 Ariz. 191, 735 P.2d 801, 811 (1987) and *State v. Kuone*, 243 Kan. 218, 757 P.2d 289, 292-93 (1988)).

[166] Dr. Neil S. Kaye, M.D., Gary Johnson, Ph.D., and Michelle Sullivan, Ph.D.

[167] Jill Morrison, Siobhan Sullivan, Jennifer Bartels-Houghton, Virginia Columbus, and Kimberly Lynch-Horstmann.

[168] The most significant of these for the purposes of this appeal were read from the stand by Dr. Kaye.

the state of mind exception of D.R.E. 803(3), certain of the statements made to the psychotherapists are inadmissible for the same reason. We conclude that, whether or not the statements to the psychotherapists are admissible under D.R.E. 803(4),[169] the admission of these statements, together with the inadmissible hearsay statements made to the friends, constitutes harmless error because these statements are cumulative of statements admitted under stipulation. The following harmless error analysis therefore assumes that the statements made to psychotherapists should not have been admitted to the extent they contain facts remembered or believed.[170]

Capano focuses on four categories of inadmissible evidence that were each presented through the testimony of one or more of the witnesses listed above: (1) the "gift incident" testimony that Fahey said Capano broke into her apartment at night and took back gifts that he had previously given her; (2) references to Capano "stalking" Fahey; (3) a discussion of Fahey's fear of being kidnapped by Capano; and (4) the "garage incident," in which Capano locked Fahey in a garage for several hours while they argued.[171]

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[169] As explained in Subsection C below, we have concluded that the statements to psychotherapists are admissible on a separate basis through the medical diagnosis or treatment exception of 803(4).

[170] Under our alternative holding that the statements to psychotherapists are admissible, the remaining erroneously admitted hearsay testimony of the friends would clearly be negligible in comparison with the stipulated testimony and the psychotherapists' testimony relating the same information.

[171] *See* Tr. of Oral Argument, 6/13/01 at 3-7 ("The evidence at issue in this matter falls into four principal categories.").

We agree that, standing alone, the hearsay testimony about these factual incidents is a fact remembered or believed and is outside the Rule 803(3) exception. But, crucially, some of Fahey's hearsay statements were also presented through testimony to which Capano stipulated. Specifically, Capano stipulated to the admission of three sets of evidence: (1) Fahey's diary, (2) emails between Capano and Fahey, and (3) the testimony of Kim Lynch-Horstmann.[172] Of course, the admission of this evidence is not an issue in this appeal, but the *effect* of the admission of this evidence by stipulation is critical to our harmless error analysis.

The issue is whether the erroneous admission of the four categories of evidence was harmless beyond a reasonable doubt.[173] We must determine whether the State

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[172] The parties do not dispute that this evidence was stipulated at trial. *See* Tr. of Oral Argument, 6/13/01 at 11; Appellant's Reply Supplemental Memorandum at 11.

[173] *See Dowling v. United States*, 493 U.S. 342, 353-53, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990) (asserting that improper admission of evidence violates due process if it "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions' ") (citations omitted); *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967) ("Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.") The erroneous admission of hearsay statements by an unavailable declarant against Capano clearly implicates his right to confront his accusers under the Confrontation Clause. Therefore the constitutional harmless error standard applies. *See Barrow v. State*, Del. Supr., 749 A.2d 1230, 1245 (2000); *Nelson v. State*, Del. Supr., 628 A.2d 69, 77 (1993) ("Alternatively, when the evidentiary error is of a constitutional magnitude, the convictions may be sustained if

"has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[174] The State argues that the erroneously admitted evidence is similar to the evidence admitted pursuant to stipulation, and thus is not prejudicial. Capano argues that the four categories of evidence at issue add new and damaging detail and thus are not cumulative of the subject matter of the stipulated evidence.

Specifically, Capano argues that this evidence was "grossly prejudicial," that the State had a weak case based on circumstantial evidence, and that "to fill the void, the prosecution relied on Fahey's extrajudicial statements that Capano was stalking her and was violently jealous. . . . " Capano supports this view by contending that in closing argument the prosecutor emphasized the theme of Capano being "controlling and manipulative." Capano also argues that the statements were especially prejudicial because they came from a sympathetic victim.

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the error is harmless beyond a reasonable doubt.") (citation and internal quotation omitted); *Smith v. State*, Del. Supr., 647 A.2d 1083, 1090-91 (1994) (same) (citing *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967)); *see also*, 647 A.2d at 1091 ("Upon a finding that a defendant's constitutional rights were violated, a reviewing court must 'weigh the significance of the error against the strength of the untainted evidence of guilt to determine whether the error may have affected the judgment.' ") (quoting *Van Arsdall v. State*, Del. Supr., 524 A.2d 3, 11 (1987)).

[174] *Jackson v. State*, Del. Supr., 643 A.2d 1360, 1377 (1994) (quoting *Satterwhite v. Texas*, 486 U.S. 249, 108 S. Ct. 1792, 1798, 100 L. Ed. 2d 284 (1988)).

We have concluded that the admission of the testimony was harmless beyond a reasonable doubt because it is cumulative of the stipulated testimony and therefore had minimal prejudicial impact.[175] We begin by examining the substance of the stipulated testimony.[176]

In her last diary entry, Fahey called Capano a "controlling, manipulative, insecure, jealous maniac."[177] In another entry, Fahey described Capano as "cold" and "disinterested," stating that he "called and was nasty," that he "raised his voice at me" and was "furious with me."[178] Fahey wrote: "I was afraid he would fly off the handle again."[179] Lengthy stipulated testimony from Lynch-Horstmann added to this depiction of Capano. Through Lynch-Horstmann's testimony, the jury heard that Fahey viewed Capano as "angry" and "obsessive."[180] According to Lynch-Horstmann, Fahey "felt she had to

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[175] *See Dowling*, 493 U.S. at 353-53; *Chapman*, 386 U.S. at 24 (describing harmless error analysis for federal constitutional errors). *See United States v. Johnson*, 7th Cir., 127 F.3d 625, 631 (1997) ("Because of its limited (or nonexistent) prejudicial effect on the defendant, the admission of hearsay constitutes harmless error when it is cumulative to other testimony already presented.") (citing *United States v. Brown*, 7th Cir., 31 F.3d 484, 491 (1994)); *Keith v. State*, 2001 Del. LEXIS 167, *6, Del. Supr., No. 303, 2000, 2001 WL 433455, Berger, J. (April 25, 2001) (ORDER) ("The testimony was also cumulative of other, non-hearsay testimony, rendering any error harmless in any case.").

[176] The diary, the emails, and the Lynch-Horstmann testimony.

[177] Tr. of 10/28/98, at 155-56.

[178] *Id.* at 152-54.

[179] *Id.*

[180] Tr. of 11/6/98, at 97.

escape. She was very aware that the obsessiveness of it was weighing very heavily on her shoulders. And sometimes she said I feel like I have to move out of the state to get away from him."[181]

Importantly, the stipulated testimony also described several specific incidents between Capano and Fahey, adding considerable detail to this picture of a "controlling, manipulative, insecure, jealous maniac." For instance, in an email message to Capano, Fahey wrote: "Tommy, you scared me this weekend, starting with Friday and all the calls you placed. It really freaks me out when you call every half hour. . . . "[182] Lynch-Horstmann's testimony related numerous specific incidents centering on these themes. She testified:

> There was an event in Delaware that Annie was very excited about going to with Michael called – I think it was the Grand Gala. And Tom had threatened her that he was going to be there, and she was very afraid that he was going to expose their relationship at this event.[183]

Other testimony given by Lynch-Horstmann focused on Capano's manipulation of Fahey and the volatility of their relationship. For example, she related that Fahey told her that Capano humiliated Fahey by talking about their affair to a priest at a church Fahey attended, causing her to stop attending that church.[184] Lynch-Horstmann also testified that according to Fahey, Capano would

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[181] *Id.* at 100.

[182] Tr. of 10/27/98, at 115-16.

[183] Tr. of 11/6/98, at 106-07.

[184] *Id.*

"attack [Fahey's] insecurities and refer to her as white trash" and tell her "that she should be lucky that he's even going out with her because of who he is and what he could buy and where she came from."[185] She testified that Capano was giving Fahey "a hard time" about staying at the shore in a house where other men would be staying. According to her testimony, Fahey "called me . . . to say . . . that Capano had just left and they had had a huge fight because he did not want her going to the shore. . . . This fight ensued and she was too exhausted to make this trip to the shore."[186]

We must examine the non-stipulated, erroneously admitted hearsay testimony in light of this extensive stipulated testimony reflecting on themes of fear, harassment, obsession, and control. Turning to the first of the four categories of evidence not admitted pursuant to stipulation, Capano focuses on the prejudicial effect of what is known as "the gift incident," which Capano refers to as an "especially noteworthy" instance of prejudicial evidence. According to Dr. Johnson, Capano came "to [Fahey's] apartment quite late at night . . . bolted the door shut and kept her inside for, my recollection was, three or four hours during which time he yelled at her, threatened to expose their relationship."[187] Capano then

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[185] *Id.* at 103.

[186] *Id.* at 92-93. Lynch-Horstmann also related another instance of fighting, one that occurred on a trip to an expensive resort at the end of their relationship, which was apparently a "disaster" because of the fighting. *Id.* at 212. We assume from the overall context of the record that these "fights" were verbal and not physical.

[187] Tr. of 10/29/98, at 16.

"took many of the gifts that he had given her out of the apartment and then eventually returned them."[188] Dr. Sullivan gave a similar account of this incident as reported to her by Fahey. She added that Fahey told her that she was too "frozen" to call for help, and that Capano "grabbed her arm and pushed her against the wall."[189] Jill Morrison, another of Fahey's friends, testified that one night "he came up the fire escape and they had a fight and he took back the gifts."[190]

This testimony is largely cumulative of the stipulated testimony described above. The incident itself was introduced by stipulation through Lynch-Horstmann's testimony. She testified that Capano "tried to remove all of the gifts that he had given Annie from her apartment because he didn't want another man watching the TV that he had given her, the clothes – seeing Annie wear the clothes that he had given her, so he removed a lot of those things from her apartment."[191] Thus the jury knew that he had come in and taken away the gifts he had given to her.

Capano argues that the psychologist testimony regarding the gift incident is significantly more damaging than the stipulated testimony because it depicts Capano acting violently – breaking into the apartment, grabbing Fahey's arm and pushing her. This argument calls for a degree of parsing that is not realistic in view of the

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[188] *Id.*

[189] Tr. of 10/29/98, at 45.

[190] Tr. of 11/4/98, at 60-61.

[191] Tr. of 11/6/98, at 97-98.

extensive amount of similar, stipulated testimony. The incident depicts Capano as controlling, angry, and ultimately menacing. As explained above, this is just what *the jury had heard through* Fahey's diary entries, the emails, and Lynch-Horstmann. The jury had heard that Fahey was literally "scared" of Capano – "afraid he would fly off the handle again" – and had also heard about several specific fights. Capano's argument that the "gift incident" testimony truly stands out from the numerous other accounts of his relationship with Fahey is not convincing.

The three other categories of evidence at issue also carry minimal risk of prejudice because they are cumulative of the stipulated testimony. The first of these is "stalking" testimony. This category includes the testimony of Siobhan Sullivan that Fahey said of Capano, "He's fucking stalking me."[192] It also includes testimony from Fahey's doctors. For example, Dr. Kaye testified that "if [Capano] was stalking her, sending her too many emails, parking his car in front of her home and she would notice it, not want him there, then you would expect to see . . . flare-ups in the eating disorder."[193] Capano would show up unexpectedly, so that she would fear him "appearing at times where she wasn't ready to greet him in a public place."[194] He would also come "over to the house uninvited, wanting to get in, making a scene such that he was allowed in."[195]

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[192] Tr. of 11/4/98, at 161.

[193] Tr. of 10/27/98, at 41.

[194] Tr. of 11/2/98, at 24 (Dr. Sullivan).

[195] Tr. of 10/29/98, at 32 (Dr. Sullivan).

The stalking testimony, exemplified by the above excerpts, is also cumulative of the stipulated testimony. Apart from the *characterization* of Capano's actions, *i.e.*, apart from the use of the word "stalking" to describe them, this testimony simply paints the same picture of obsession that was testified to by Lynch-Horstmann. The following excerpt from her stipulated testimony suffices to make the point:

> He would e-mail her at work all the time, and they were kind of obsessive e-mails. . . . [Capano] would be upset that she wouldn't see him or wouldn't talk to him. At one point he threatened to commit suicide because he said he couldn't live without her. So there was a lot of pressure on Annie because he was saying – there was a lot of pressure on Annie. He was saying I left my wife so we could be together. So there was a lot about the e-mails."[196]

As noted above, Fahey's email to Capano also reflected this theme of obsession, stating, "Tommy, you scared me this weekend, starting with Friday and all the calls you placed. It really freaks me out when you call every half hour. . . . "

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[196] Tr. of 11/6/98, at 98. Similarly, she testified:

> Well, it was right around that time, in September, I believe, that he did leave his wife, so he was very angry that she did not want to see him anymore at that point in time. So it was – she was struggling because he was very angry, and saying that he left his wife and now it was their time to be together, and he was pretty obsessive at that point.

Id. at 92-93. Capano's threatened appearance at the Grand Gala, discussed above, is of a similar nature.

The next category of evidence Capano focuses on is Dr. Sullivan's statement that Fahey told her "she was very concerned about getting kidnapped" and she thought that it was Capano who might kidnap her.[197] Again, in light of the stipulated testimony, the vague and isolated discussion of kidnapping is essentially cumulative and harmless. Through Fahey's diary, the emails, and Lynch-Horstmann's testimony, the jury heard repeated testimony to the effect that Fahey was genuinely frightened of Capano. Moreover, this brief testimony appears to have been coaxed out of Fahey by Dr. Sullivan, who encouraged Fahey to muse about her fears, in a way that lessens the likelihood of prejudicial impact.[198]

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[197] Tr. of 10/29/98, at 36.

[198] Dr. Sullivan testified:

Q: Do you recall a time when she started to speak with you about a fear of violence from Mr. Capano at any time?

Dr. Sullivan: What she did [say] was she [was] very concerned about getting kidnapped.

Q: And what did she tell you about getting kidnapped?

Dr. Sullivan: Well, she – she and her friend had been talking about this vaguely, and she came into the office and said, so and so said, gosh, I could get kidnapped, what do you think, Michele? And I said, What is this about, and she said, Well, my friend thinks that somebody could kidnap me. And I said, Well, talk to me more about what this is about. I became extremely distressed and she said, Oh, I don't know, somebody could just take me away or something, and I said, Who would do this, and she said, Well, probably a third party. And I said, Well, what do you mean, that somebody would hire a third

The final category of evidence involves the "garage incident" testified to by Morrison:

> "Yes, she told me of an incident where he had picked her up and took her back to his house into the garage and locked the doors and would not let her out of the garage while they argued and he made attempts to keep the relationship together. This was extremely frightening to Anne Marie because she had a fear of being locked in small dark places, and it was very upsetting for her."[199]

Again, this testimony is akin to the stipulated testimony. Fahey's diary, the emails, and Lynch-Horstmann's testimony portrayed Capano as a "controlling, manipulative, insecure, jealous maniac." The garage incident simply portrays the type of harassing behavior that permeated the stipulated testimony, such as "calling and leaving maybe 15 messages on her answering machine in a two-hour period of time, [and telling her] that she had to talk to him, why wasn't she calling him back, that he needed to talk to her."[200] The stipulated testimony also makes several significant and detailed references to "furious" and "exhausting" fighting.[201] The additional detail of Fahey being locked in the garage with Capano

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party? She said, Yeah. Who would do that? Mr. Capano. And I said, Well, is there anybody else that might do that, and she thought for a long while and said maybe a boyfriend of three or four years ago. *Id.* at 36-37.

[199] Tr. of 11/4/98, at 62.

[200] Tr. of 11/6/98, at 97-98 (Lynch-Horstmann).

[201] Tr. of 10/28/98, at 152-54; Tr. of 11/6/98, at 92-93.

cannot have affected the outcome of Capano's trial. The garage incident, as well as the other evidence discussed above, is essentially cumulative and therefore harmless beyond a reasonable doubt.

Finally, we note that the limiting instructions issued by the trial court reduced the risk that any of this testimony would be a basis for inferring Capano's guilt.[202]

We conclude that the trial court erroneously admitted under the state of mind exception hearsay testimony from Fahey's psychotherapists and friends concerning specific incidents and beliefs described by Fahey. But, in view of the extensive and damaging hearsay evidence to which Capano stipulated at trial, we conclude that the erroneously admitted evidence was largely cumulative and

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[202] Following Dr. Kaye's testimony, the trial court instructed the jury that:

> The purpose of this evidence is to examine the mental state, the emotional state of Anne Marie Fahey, and you are not – it in no way reflects as evidence of any actions or any state of mind on behalf of the defendant. This deals solely with Miss Fahey, not with Mr. Capano.

Tr. of 10/27/98, at 136. In connection with Jill Morrison's testimony, the court also instructed the jury that evidence of particular incidents involving harassing conduct:

> is offered or may be considered by you solely for the purpose of determining the state of mind of Miss Fahey at or about the time when the alleged acts occurred. You may not consider the evidence as proof that the defendant is a bad person, and therefore, probably committed the offense with which he is charged.

Tr. of 11/4/98, at 23-24.

that the trial court's error was harmless beyond a reasonable doubt.[203]

C. *Admissibility of Fahey's Statements to Her Psychotherapists Under D.R.E. 803(4)*

We now turn to the issue concerning whether the medical diagnosis exception in D.R.E. 803(4) applies to statements made for purposes of psychotherapy – as distinct from statements made for purposes of diagnosing physical ailments. Specifically, Capano argues that the trial court erroneously admitted testimony from Fahey's psychotherapists recounting her statements to them during the course of Fahey's therapy. The State responds that the exception, by its terms, applies to statements made by a patient to licensed psychiatrists and psychologists during therapy.

As an alternative holding, we conclude that Fahey's statements to her psychotherapists are admissible independently under the medical diagnosis or treatment exception set forth in D.R.E. 803(4).[204]

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[203] *See Dowling*, 493 U.S. at 353-53; *Chapman*, 386 U.S. at 24 (describing harmless error analysis for federal constitutional errors).

[204] This holding is alternative in the sense that, even if we did not reach the question of admissibility under Rule 803(4), we have already concluded in Subsection B that the trial court's decision to admit Fahey's statements of memory or belief under Rule 803(3) was harmless error.

1. Application of the Medical Diagnosis Exception

Rule 803(4) provides:

> (4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms or sensations, or the inception or general character of the cause or external causes thereof insofar as reasonably pertinent to diagnosis or treatment.

Relying on the broad language of Rule 803(4), which neither specifies the type of person to whom a patient must make the statements nor explicitly restricts application of the exception to physical symptoms or ailments, the State argues that D.R.E. 803(4) applies to psychotherapists.

Capano argues, among other things, that such a broad reading of the exception renders meaningless the requirement that the statement be "reasonably pertinent to diagnosis or treatment" because nearly everything that a person has experienced, including statements of fault, is relevant to psychoanalysis. Capano also argues that in treating patients, psychotherapists do not depend on the "objective" truth of the statements made by the patients (that is, the correlation between the content of the statements and some notion of objective reality), or even on the sincerity with which the statements are made. To ensure that the medical diagnosis exception imposes a meaningful limitation on the types of hearsay statements that would be admissible at trial, Capano contends that

the exception should apply only to statements relevant to the diagnosis and treatment of *physical* ailments.[205]

The State counters that statements made during therapy are likely to be highly reliable because patients have a strong motivation to be truthful in communicating with psychotherapists to ensure an accurate diagnosis and appropriate treatment. To the extent that unfairly prejudicial testimony may become admissible under a broad reading of the exception, the State maintains that such testimony may be excluded under the Rule 403 balancing test.

This argument presents us with an issue of first impression. We have concluded that the better-reasoned view is that statements to either a psychiatrist (a medical doctor specializing and certified in psychodiagnosis or psychotherapy) and a psychologist (a trained and certified professional – not a medical doctor – who specializes

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[205] *See, e.g., State v. Zimmerman*, 121 Idaho 971, 829 P.2d 861, 864 (1992) ("A psychologist does not provide 'medical' treatment as contemplated by the rule."); *People v. LaLone*, 432 Mich. 103, 437 N.W.2d 611, 612-13 (1989) (holding that psychotherapists' testimony does not fall within medical diagnosis exception because "statements made in the course of the treatment of psychological disorders may not always be as reliable as those made in the course of the treatment of physical disorders" and because psychological ailments are difficult to verify); *State v. Barone*, Tenn. Supr., 852 S.W.2d 216, 220 (1993) (same); *Hall v. State*, Miss. Supr., 539 So. 2d 1338, 1342 n.8 (1989) (refusing to extend exception "beyond the diagnosis and treatment of matters medical") (superseded by amendment to Mississippi Rule 803(4) as noted in *Hall v. State*, Miss. Supr., 611 So. 2d 915, 921-22 (1993)).

in psychodiagnosis or psychotherapy) *may* be admissible under D.R.E. 803(4).

We do not declare a general view that such statements will always – or even usually – be admissible. But if a firm foundation with respect to the qualifications of a psychotherapist and the proper professional circumstances is established, statements made to that professional by a patient voluntarily submitting to diagnosis or undergoing mental health treatment may, in the discretion of the trial court, be admissible in a given case. While in some cases statements of the patient made to the professional in the course of psychodiagnosis or psychotherapy may be unreliable, inappropriately far-ranging, or unduly prejudicial, they are not necessarily so.

To establish the appropriate foundation, the proponent must show that the statements satisfy the two-part reliability test first developed in *United States v. Iron Shell*.[206] First, the declarant's motive in making the statement must be consistent with the purpose of promoting treatment, and the declarant must be aware that the diagnosis and treatment of her ailment depend on the accuracy of her statements.[207] Second, doctors must reasonably rely on this sort of information in diagnosis or

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[206] 8th Cir., 633 F.2d 77, 83-84 (1980) (applying F.R.E. 803(4) to admit doctor's testimony concerning the victim's statements in a child rape case); *see also United States v. Renville*, 8th Cir., 779 F.2d 430, 436 (1985).

[207] *See Iron Shell*, 633 F.2d at 83-84 ("[The exception] relies upon the patient's strong motive to tell the truth because diagnosis or treatment will depend in part upon what the patient says.").

treatment.[208] Finally, the trial judge must conduct a proper D.R.E. 403 analysis and determine that the probative value is not substantially outweighed by the danger of unfair prejudice.

These safeguards must be employed by the trial judge to ensure that admission of psychotherapist testimony is consistent with the rationale underlying the medical diagnosis exception: "[A] person seeking medical treatment is unlikely to lie to a doctor she wants to treat her, since it is in her best interest to tell the truth."[209] Limiting hearsay testimony in this manner also assures that psychotherapists' testimony about their patients is not used to circumvent the rule against hearsay.[210]

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[208] *See id.* (citing F.R.E. [sic] 703).

[209] *Ring v. Erickson*, 8th Cir., 983 F.2d 818, 820 (1993); *see also State v. Robinson*, 153 Ariz. 191, 735 P.2d 801, 809 (1987) (admitting testimony of psychologist under *Iron Shell* test); *State v. Altgilbers*, 109 N.M. 453, 786 P.2d 680, 686 (1990) (same); *Felix v. State*, 109 Nev. 151, 849 P.2d 220, 249-50 (1993) ("In proffering statements made to psychiatrists or psychologists for the purpose of medical treatment or diagnosis, the proponent of the evidence must show, directly or indirectly, and the trial court must satisfy itself, that the patient understood the need to speak truthfully and that the statements were reasonably necessary for the treatment or diagnosis of the patient.").

[210] Capano suggests that admission of hearsay testimony from psychologists will permit psychologists to testify with impunity in place of their patients. This fear is misplaced for three reasons: (1) to be admissible, the testimony must be relevant and not unfairly prejudicial under D.R.E. 401, 402, and 403; (2) the testimony must relate to the psychological treatment and must satisfy the two-part reliability test; and (3) opposing counsel may cross-examine the psychotherapists on the purpose of the diagnosis (that is, whether the goal of the diagnosis was treatment or preparation for litigation).

Thus, where the patient's statements and the circumstances demonstrate reliable guarantees of trustworthiness we find no supportable reason why there should be a blanket exclusion of statements made to psychotherapists as compared to the general acceptance of statements made to doctors or medical paraprofessionals for physical ailments.[211]

In this case, we find that the trial judge properly exercised his discretion under circumstances consistent with our holding. The qualifications of Dr. Neil Kaye, M.D., Dr. Michelle Sullivan, and Dr. Gary Johnson, the psychotherapists, were established. The professional circumstances of Fahey's diagnosis or treatment were

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[211] *See, e.g., United States v. Newman*, 7th Cir., 965 F.2d 206, 210 (1992) ("The rationale [of F.R.E. [sic] 803(4)] applies as forcefully to a clinical psychologist as to a physician, and warrants us in reading 'medical' broadly."); *Morgan v. Foretich*, 4th Cir., 846 F.2d 941, 949 n.17 (1988) (same); *State v. Nelson*, 138 Wis. 2d 418, 406 N.W.2d 385, 390 (1987) (same); *United States v. Balfany*, 8th Cir., 965 F.2d 575, (1992) ("Statements about abuse . . . made by a child to a trained social worker or psychologist pursuant to diagnosis or treatment for emotional or psychological injuries are admissible under Rule 803(4)."); *State v. Hildreth*, Iowa Supr., 582 N.W.2d 167, 169 (1998) ("We agree that statements made to a social worker in connection with diagnosis or treatment of emotional trauma may fall within the purview of rule 803(4) if the social worker is sufficiently qualified by training and experience to provide that diagnosis and treatment."); *cf. State v. Cephas*, Del. Supr., 637 A.2d 20, 25 (1994) (holding that job-related mental injuries are equally compensable as physical injuries under the Delaware Workmens' Compensation Act; stating, "although the cause and existence of a mental infirmity may be more difficult to establish than its physical counterpart, a clearly proven mental injury should be accorded equal treatment under the Act").

appropriate: There is no evidence that Fahey had an improper motive in seeking help from the psychotherapists or that she believed that the success of her treatment was unrelated to the accuracy of her statements.

In addition, Dr. Kaye testified that, in diagnosing and treating patients, psychotherapists necessarily rely on the patients' statements about their relationships in treating their psychological ailments.[212] Although Capano asserts that Fahey's ailments themselves (such as depression, anxiety, compulsive obsessive disorder, and anorexia) undermine the truthfulness of her statements in therapy, Capano fails to show how these disorders might have actually affected her ability to represent accurately her thoughts and feelings.[213] Similarly, Capano argues that Fahey often failed to disclose the full details of her life to her therapists. But Capano provides no reason to question the reliability of the statements and disclosures that Fahey did make during the course of her therapy.

Fahey had a motive to be truthful and candid. There is no reasonable basis, therefore, to conclude that her statements were contrived or so far-ranging as to be irrelevant to her treatment or otherwise problematic. Moreover, the trial judge conducted a proper D.R.E. 403

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[212] Tr. of 10/27/98, at 29.

[213] In some cases, a patient's lies are as helpful to her treatment as her truthful statements. *See People v. LaLone*, 432 Mich. 103, 437 N.W.2d 611, 612-13 (1989); 3 Federal Rules of Evidence Manual, *supra*, at 1666 ("But while a doctor relies only on reliable information to treat a patient for physical ailments, a psychiatrist relies on all information, truthful and untruthful, to treat the patient."). There is no evidence that this concern applies to the present case.

balancing test and concluded that the probative value of the psychotherapists' testimony was not substantially outweighed by the danger of unfair prejudice.[214]

Finally, it should be noted that the D.R.E. 803(4) exception for medical diagnosis or treatment does not contain the same limitation as the state of mind exception under D.R.E. 803(3) regarding a fact remembered or believed. Accordingly, to the extent that the psychotherapists' testimony regarding Fahey's statements included facts remembered or believed, they are not barred under D.R.E. 803(4). Therefore, they are either admissible under this alternative basis or constitute harmless error under the analysis previously set forth in this Opinion.

2. Confrontation Clause Analysis of Statements Admitted Under the Medical Diagnosis Exception

Although the medical diagnosis or treatment exception of D.R.E. 803(4) has been recognized in its generic form as "firmly rooted" for purposes of the Confrontation Clause,[215] the exception has not historically been extended to psychotherapists in Delaware. Capano therefore argues that the medical diagnosis exception is not "firmly rooted" as applied to psychotherapists. But we need not reach that issue because the alternative ground

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[214] Tr. of 10/26/98, at 24-29; 11/2/98 at 5, 181.

[215] *See White v. Illinois*, 502 U.S. 346, 112 S. Ct. 736, 743 n.8, 116 L. Ed. 2d 848 (1992) (medical diagnosis exception); *Forrest v. State*, Del. Supr., 721 A.2d 1271, 1274 (1999) (state of mind exception).

of "particularized guarantees of trustworthiness" under the Confrontation Clause jurisprudence is applicable here.

As noted above, the plurality opinion in *Lilly* holds that the Confrontation Clause may be satisfied if the proponent of the evidence carries its burden of showing that the contested statements possess " 'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to the statement's reliability."[216] Reliance on this prong of the Confrontation Clause requires a showing that the "declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility."[217]

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[216] *Lilly*, 527 U.S. at 125. This inquiry is known as the "residual trustworthiness test." *Id.* at 136. Compare D.R.E. 803(24) (authorizing admission of a statement not specifically covered by the enumerated exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines its materiality, that it is more probative than certain other evidence, that the interests of justice are best served by admitting the evidence, and the proponent gives advance notice.). We need not address the specific applicability of D.R.E. 803(24) to this case.

[217] *Wright*, 497 U.S. at 820; *see also id.* at 820 (holding that a determination that a statement possesses "particularized guarantees of trustworthiness" requires an examination of the circumstances "that surround the making of the statement and that render the declarant particularly worthy of belief."). Courts have significant leeway in determining the factors that provide the indicia of reliability necessary for hearsay testimony to satisfy the Confrontation Clause. *See id.*. Essentially, the State must demonstrate that the statements are as reliable as those admitted pursuant to a "firmly rooted" exception. *See id.* at 821.

In this regard, we believe that it is particularly important that the statements satisfy the general requirements for admissibility established in *Derrickson*. *Derrickson*, which applies to the state of mind exception, requires "that the statement(s): i) must be relevant and material; ii) must relate to an existing state of mind when made; iii) must be made in a natural manner; iv) must be made under circumstances dispelling suspicion; and v) must contain no suggestion of sinister motives."[218]

In the present case, Fahey made the statements to her psychotherapists in a natural manner during therapy sessions and – at least for the most part – did not make the statements in response to questioning. In addition, there is nothing to indicate that Fahey made the statements under suspicious circumstances or in a manner suggesting that she had sinister motives. Rather, it appears that Fahey was expressing her concerns and fears regarding her relationship with Capano to those persons in whom she regularly confided. This conclusion finds further support in the "spontaneity and consistent repetition" of the statements.[219] Fahey made nearly identical statements concerning her intentions and her emotional state to a number of her psychotherapists and friends. In short, the nature of Fahey's statements, the manner in which they

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[218] *Forrest*, 721 A.2d at 1276.

[219] The United States Supreme Court has observed that "spontaneity and consistent repetition" and a "lack of motive to fabricate" are appropriate factors to consider in determining whether a statement possesses "particularized guarantees of trustworthiness." *See*, 497 U.S. at 821-22 (citing *State v. Robinson*, 153 Ariz. 191, 735 P.2d 801, 811 (1987) and *State v. Kuone*, 243 Kan. 218, 757 P.2d 289, 292-93 (1988)).

were communicated, and the persons to whom the statements were directed collectively establish that Fahey was speaking candidly. We therefore conclude that the admissible hearsay testimony presented by Fahey's psychotherapists possesses "indicia of reliability" and "guarantees of trustworthiness" sufficient to satisfy the Confrontation Clause. Thus the D.R.E. 803(4) exception as applied here satisfies the Confrontation Clause.

Finally, our decision to affirm the trial judge's decision in admitting the hearsay evidence is independently supported under the state of mind exception of D.R.E. 803(3) and the harmless error analysis, whether or not the psychotherapists' testimony is also independently admissible under D.R.E. 804(3). These conclusions apply both for Delaware evidentiary law purposes and for purposes of the federal Confrontation Clause analysis.

V. Lesser Included Offenses

Capano requested that the trial judge instruct the jury on the following lesser included offenses to the charge of first degree murder: second degree murder, manslaughter, and criminally negligent homicide.[220] This request was made on two grounds. First, that there was evidence refuting the State's theory of intentional killing; and second, that Capano's testimony that Fahey was shot accidentally would support a verdict based on reckless or negligent homicide. The trial court denied the request, stating that "the State's theory produces some evidence of intent, but there isn't any evidence of recklessness or

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[220] Tr. of 1/11/99, at 201.

negligence in this particular case."[221] Addressing Capano's accident defense, the trial court further stated that it also failed to provide a basis for a theory of reckless or negligent killing by Capano.[222]

Murder in the second degree is defined as "recklessly causing the death of another person under circumstances which manifest a cruel, wicked and depraved indifference to human life."[223] Manslaughter is defined as "recklessly causing the death of another person."[224] A person is also guilty of manslaughter when the person "intentionally causes the death of another person under circumstances which do not constitute murder because the person acts under the influence of extreme emotional disturbance."[225] Criminally negligent homicide is defined as causing, "with criminal negligence, . . . the death of another person."[226]

In reviewing Capano's claim that he was entitled to a jury instruction on any of these lesser included offenses, the statute and the case law require that we determine whether "there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged

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[221] Tr. of 1/11/99, at 207.

[222] *Id.*

[223] 11 Del. C. § 635; *see also* 11 Del. C. § 231(c) (defining recklessness).

[224] 11 Del. C. § 632(1).

[225] 11 Del. C. § 632(3).

[226] 11 Del. C. § 631; *see also* 11 Del. C. § 2321(d) (defining criminal negligence).

and convicting the defendant of the included offense."[227] We review *de novo* Capano's claim that there was a rational basis for the requested instructions.[228] We have concluded that there is no rational basis in the evidence to support a charge on any of the lesser included offenses advanced by Capano.

A. Contentions of the Parties

Capano's argument in support of the first ground (that he was entitled to an instruction on the lesser included offenses because there was evidence tending to refute an intentional killing) is that "[a] jury, looking at *all* the evidence, could have decided that Capano and Fahey went out to dinner on Thursday night, June 27th, just as they usually did, and that, later that night, a sudden and spontaneous incident, for example, an argument that raged out of control, resulted in Fahey's death, but that her death was not intended and certainly not planned." The premise of this argument is that there was some evidence of an "argument that raged out of control," suggesting a spontaneous crime of passion, recklessness or negligence. We find no support in the record for this premise.

Capano's argument rests on two related contentions. First, he contends that the accident defense he presented

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[227] *Zebroski v. State*, Del. Supr., 715 A.2d 75, 82 (1998) (quoting 11 Del. C. § 206(c)).

[228] *See id.* at 82; *cf. Zimmerman v. State*, Del. Supr., 628 A.2d 62, 66-67 (1993) (applying *de novo* review to Superior Court's denial of requested instruction on "claim of right" defense to theft or extortion).

through his testimony does not preclude an instruction on lesser included offenses, even though it is totally inconsistent with the theory that Fahey died after an argument with Capano. Second, Capano argues that there is a rational basis for any or all three of the lesser included offenses because the jury can "reject or accept all or part of a witness' testimony, or all or part of the State's theory of the case, or all or part of the defense case." Under this reasoning, the jury is free to fill in the "gaps" in the State's case without any evidence in order to construct a speculative scenario of reckless or negligent homicide. The State argues that by "limiting his defense to MacIntyre's accident, Capano ruled out any argument that he killed Fahey either accidentally or otherwise." Although we do not agree entirely with the State's argument, we have concluded that Capano's testimony and the elements of the lesser included offenses are mutually exclusive. Also, there is no evidence in this record to furnish a rational basis for the elements of the lesser included offenses.

B. No Preclusion

As noted, the Delaware statute[229] expressly provides that the trial court is "not obligated to charge the jury with respect to an included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense." In cases where a jury

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[229] 11 Del. C. § 206(c).

could rationally disregard a defendant's exculpatory testimony, that testimony does not preclude the conviction of an included offense. We have concluded that in this case, the jury could rationally disregard all of Capano's testimony that Fahey was shot as a result of Capano's efforts to grab the gun from MacIntyre's hands.[230] Therefore, Capano's exculpatory testimony cannot be the *sole* basis for precluding lesser included offenses.

This reasoning is supported by our holding in *Miller v. State*.[231] In *Miller*, the defendant was charged with arson in the first degree for allegedly setting his former landlord's residence on fire. The State called two witnesses, each of whom testified that they observed the defendant entering the house through a back window and exiting minutes later. Each witness also testified that he saw smoke coming from the house shortly thereafter. In addition, the State called the former landlord, who testified that he had recently evicted the defendant from the residence.[232]

The defense offered three witnesses: the defendant's mother, the defendant's girlfriend, and the defendant. Each testified that the defendant was "at his mother's house at the time of the alleged arson and burglary."[233] "The thrust of the defense was that the defendant was

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[230] Tr. of 12/21/98, at 191.

[231] Del. Supr., 426 A.2d 842 (1981).

[232] *See id.* at 843.

[233] *Id.*

elsewhere."[234] The issue on appeal was whether, notwithstanding the defendant's exculpatory alibi defense, the defendant was entitled to a jury instruction that he could be acquitted of first degree arson and convicted of the lesser included offense of arson in the second degree.[235]

Citing Section 206(c), we held in *Miller* that the defendant's exculpatory defense did not preclude a charge on arson in the second degree, and that based on the evidence the charge should have been given.[236] *Miller* stands for the proposition that a jury can convict of a lesser included [offense] even when the defendant's testimony, if believed by the jury, would result in acquittal.

More recently, in *Webb v. State*, we cited *Miller* for the proposition that the rational basis "standard applies even where the defendant denies any involvement in the charged offense."[237] But, in *Miller*, unlike the case before us, there was some evidence from which a rational juror could infer the elements of the lesser included offenses.

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[234] *Id.* at 845.

[235] The distinction between the two "depended on the [statutory] aggravating element of whether the defendant knew of circumstances which rendered the presence of another person not an accomplice (in the building) a reasonable possibility." *Id.*

[236] *See id.* The rational basis in the evidence for an instruction on second degree arson was that the defendant had not lived in the building for over a month.

[237] *Webb v. State*, Del. Supr., 663 A.2d 452, 462 (1995). We held that Webb was not entitled to a lesser included offense instruction because there was no rational basis in the evidence for such a charge. *See id.* at 463.

In support of its preclusion argument, the State cites the following language from *Manchester v. State*:[238]

> In applying Section 206(c), this Court has held that where the defense is complete innocence to a charge of first degree murder, there can be only two choices for the jury: guilty of first degree murder or innocent. *Dutton v. State*, Del. Supr., 452 A.2d 127, 146 (1982); *Bailey v. State*, Del. Supr., 521 A.2d 1069, 1093-94 (1987).

We do not read *Manchester* or the cases it cites as adopting a rule of *automatic* preclusion where the defense is complete innocence. As we observed in *Manchester*, "there was no rational basis in the evidence for a charge on a lesser-included offense."[239] Similarly, in *Dutton* and *Bailey* we held that the denial of a lesser included instruction was not error because "there is nothing in the record which would support a jury finding under the particular instruction . . . sought."[240] These cases rely on fact-sensitive analysis and do not stand for a rule of automatic preclusion when the evidence – apart from the exculpatory version of events offered by the defendant – would support conviction of an included offense.[241]

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[238] Del. Supr., 532 A.2d 1000, 1987 Del. LEXIS 1239, *8, 1987 WL 44962, (1987) (ORDER).

[239] *Id.*

[240] *Bailey*, 521 A.2d at 1069, 1093; *see also Dutton*, 452 A.2d at 146 (finding no support in the record for requested lesser included offense instruction).

[241] When the defendant's testimony *corroborates* an element of the offense charged, however, it may preclude conviction of a lesser included offense. *See Ross v. State*, Del. Supr., 482 A.2d 727, 735 (1984) (holding that a jury could not find manslaughter

C. *The Evidence Here Does Not Support a Lesser Included Offense Charge*

We now address Capano's contention that based on the evidence put forward by the State there is a rational basis for acquittal of first degree murder and conviction of the lesser included offenses. The State's theory of the case was that Capano planned and intentionally killed Fahey. Capano argues that even if the State did not put forward "affirmative" evidence of recklessness or negligence, the "evidence purportedly reflecting intent was *de minimis* at best, and what little evidence there was, was equally consistent with" the lesser included offenses enumerated above. Capano argues that the jury "can reject or accept all or part of a witness's testimony, or all or part of the State's theory of the case, or all or part of the defense case." This is correct in the abstract, but it begs the question whether there is some basis in the record for inferring from the gaps in the State's case some evidence to support the elements of any of the lesser included offenses.

The State argues that no evidence was presented of recklessness or criminal negligence, and that "the jury was not free to infer a state of mind from nonexistent evidence." Our independent review of the evidence at

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based in part on fact that the defendant's "own testimony conclusively establishes an intentional killing"); *Ward v. State*, Del. Supr., 575 A.2d 1156, 1158 (1990) ("In this case, however, there is no basis for concluding that Ward was guilty only of a lesser offense. To accept Ward's position, we would have to conclude that *all testimony presented at trial was false.*") (emphasis added).

trial confirms the accuracy of the State's view. There is no such evidence. To permit the jury to find the elements of the lesser included offenses on this record would permit unguided speculation by the jury.

We hold that the evidence produced at trial does not provide a rational basis for "a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense."[242] If the jury rejected the State's planning evidence, concluding, for example, that the cooler and gun purchases were unrelated to Fahey, it could have returned a verdict acquitting the defendant. But, conviction on any other theory would require pure speculation by the jury concerning the manner of Fahey's death. Allowing a conviction on the basis of speculation would be inconsistent with the statute and our prior case law requiring a "rational basis" standard.

The possibility that Capano killed Fahey by an act that was reckless, criminally negligent, or under the influence of extreme emotional disturbance is based entirely on speculation. Although there is evidence of the disposal of Fahey's body, the parties concede that apart from the accident defense offered in Capano's testimony, there is no evidence concerning the *manner* of Fahey's death. Her body was not recovered and neither was any murder weapon. Putting aside Capano's accident defense, no one gave eyewitness testimony bearing on

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[242] *Zebroski v. State*, Del. Supr., 715 A.2d 75, 82 (1998) (quoting 11 Del. C. § 206(c)).

the circumstances under which Fahey died.[243] If the State's planning evidence and Capano's accident defense are rejected, it is *possible* that Capano killed Fahey in some kind of jealous rage, or some other reckless or negligent act. But these possibilities are only speculative. They are not supported by any rational basis in the evidence.

Capano contends that a jury could have decided that Capano killed Fahey after "an argument that raged out of control," a theory that seems to suggest that Capano acted under the influence of extreme emotional disturbance and is guilty of manslaughter. This possibility is said by the defense to be supported by evidence concerning the troubled romantic relationship between Capano and Fahey. Even assuming evidentiary support for this theory, the applicable Delaware statute places the burden on the defendant to prove that he acted "under the influence of extreme emotional distress" and "that there is a reasonable excuse or explanation for the existence of the extreme emotional distress."[244] Because none of Capano's

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[243] Small spots of blood, later determined to be Fahey's, were found in Capano's great room. Tr. of 12/1/98, at 234. Gerry Capano testified that he helped Capano dispose of a bloodstained sofa. Tr. of 11/9/98, at 54-56. This is evidence that Fahey died after sustaining injuries that caused her to bleed, but does not provide any basis for a theory of reckless or negligent killing.

[244] 11 Del. C. § 641 provides that:

> The fact that the accused intentionally caused the death of another person under the influence of extreme emotional distress is a mitigating circumstance, reducing the crime of murder in the first degree as defined by § 636 of this title to the

defense was directed at satisfying the burden he must carry under Section 641, the jury could not have found "extreme emotional disturbance" as a mitigating circumstance.[245]

Capano cites the 1994 Connecticut case of *State v. Sivri*[246] to support his argument that, because the State did not show how Fahey died, the jury could infer reckless or criminally negligent acts. In *Sivri* the evidence showed that the victim died in the defendant's home after sustaining a bloody injury, and that the defendant attempted to conceal the death and flee the country.[247]

> crime of manslaughter as defined by § 632 of this title. The fact that the accused acted under the influence of extreme emotional distress must be proved by a preponderance of the evidence. The accused must further prove by a preponderance of the evidence that there is a reasonable explanation or excuse for the existence of the extreme emotional distress. The reasonableness of the explanation or excuse shall be determined from the viewpoint of a reasonable person in the accused's situation under the circumstances as the accused believed them to be.

[245] *See Moore v. State*, Del. Supr., 456 A.2d 1223 (1983)

[246] 231 Conn. 115, 646 A.2d 169 (1994).

[247] The evidence in *Sivri* was that the victim had gone to the defendant's home to give him a professional massage and was never seen again. Her body was not recovered. The police found that blood had been spilled on the defendant's carpet equal to "one fourth to one fifth of the blood in the body of a woman of medium build." Blood was also found in defendant's car. Finally, the State presented consciousness of guilt evidence consisting of defendant's flight to Turkey and attempts to conceal the body and the bloodstains. *See*, 646 A.2d at 172-77 (summarizing facts).

Reviewing the conviction of first degree murder, the *Sivri* Court held that, although the evidence would support a finding of intent to kill, it would "permit the jury to infer that there was also a possibility that 'there was a sudden or spontaneous incident . . . resulting in the unintended death'. . . . "[248] Noting that "the evidence of intent to kill was not overwhelming," the *Sivri* Court held that the "proof on intent . . . was sufficiently in dispute" to warrant instruction on lesser included offenses.[249]

Sivri is distinguishable from this case. First, in this case, unlike the situation in *Sivri*, there is evidence of planning. The *Sivri* Court itself distinguished another Connecticut case where "evidence of prior planning and preparation" – rental of a woodchipper to dispose of the body – made the "defendant's claim of a 'sudden confrontation . . . too speculative to put the issue of intent sufficiently in dispute.' "[250] Second, this Court's precedent suggests that we would not follow *Sivri* on its facts and allow the jury the same freedom to speculate based on gaps in the State's evidence.[251]

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[248] *Id.* at 182.

[249] *Id.*

[250] *Id.* (citing *State v. Crafts*, 226 Conn. 237, 627 A.2d 877, 886 (1993)). Crafts' argument, rejected by the Connecticut Supreme Court, that he was entitled to a lesser included offense instruction "relied on the fact that the State's evidence of intent was entirely circumstantial." *Crafts*, 627 A.2d at 885.

[251] *See, e.g., Dutton v. State*, Del. Supr., 452 A.2d 127 (1982) (holding that instruction on lesser included offense is not required on facts similar to those in *Sivri*).

D. Accident Testimony Not a Basis for Lesser Includeds

The second ground on which Capano argues that he was entitled to a jury instruction on lesser included offenses is that based on his testimony alone there is a rational basis in the evidence for finding recklessness or criminal negligence. Capano testified that "Debby shot Anne Marie."[252] He testified that MacIntyre came into the great room of Capano's house where Fahey and Capano were sitting, surprising them both. MacIntyre was enraged, apparently because of Fahey's presence, and was crying and yelling. Then she threatened to kill herself.[253] According to Capano, "the left arm was coming up and I thought, oh my God, she's going to shoot herself. And so I reached out with my right hand to grab her left hand to pull the gun away from herself. And as I did that, a shot went off."[254]

This evidence does not support an instruction on a lesser included offense. This Court has held that an accident defense is incompatible with recklessness or criminal negligence.[255] Therefore, Capano's account of how

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[252] Tr. of 12/21/98, at 189.

[253] *Id.* at 188-91.

[254] *Id.* at 191. Based on this testimony, the trial court instructed the jury that it must acquit Capano "if the evidence as to accident creates a reasonable doubt as to the defendant's guilt." Tr. of 1/13/99, at 237-38.

[255] *See Smith v. State*, 1996 Del. LEXIS 330, *8, No. 38, 1996, 1996 WL 539851, Veasey, C.J. (September 19, 1996) (ORDER) ("If an act is done recklessly, it cannot be due to an accident."); *Hall v. State*, Del. Supr., 431 A.2d 1258, 1260 (1981) (observing that defendant's accident defense was the "antithesis of the acts and

Fahey died does not support recklessness or criminal negligence. Capano testified that he prevented MacIntyre from killing herself. Most important, according to Capano's testimony, MacIntyre fired the gun. Capano's testimony was that his role was simply to grab her hand as she lifted the gun up. These facts do not establish any criminal culpability. We are not persuaded by Capano's argument that a jury could find that he acted recklessly or negligently by "grabbing the arm of a hysterical woman threatening suicide and brandishing a gun."

This would be an entirely different case if Capano had testified in a manner consistent with a homicide committed in a jealous rage, or by recklessness, or by an act of criminal negligence. But he did not so testify. His testimony was confined to an accident scenario that involved no crime on his part. To permit Capano now to prevail on an argument that the jury could completely have disregarded both the State's evidence and Capano's testimony and to speculate on a scenario that has no evidentiary support whatsoever would fly in the face of clearly established Delaware statutory and case law.

E. No Due Process Violation

Capano argues that the refusal to instruct on lesser included offenses violated Capano's due process rights. Relying principally on the 1980 United States Supreme Court decision in *Beck v. Alabama*, and Delaware authority as well, Capano argues that because he is a defendant in a

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states of mind which characterize the various degrees of homicide").

capital case he has a constitutional right to a lesser included offense instruction in this case.[256]

Capano's argument fails because the right to a lesser included offense instruction depends on there being a rational evidentiary basis for that instruction. *Beck* is consistent with that rule. And its facts were significantly different from the facts before us.

Beck struck down Alabama's *statutory prohibition* on giving a lesser included offense instruction. In *Beck*, the Alabama statute provided that as to capital offenses:

> If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation *shall not include any lesser offenses*.[257]

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[256] *Beck v. Alabama*, 447 U.S. 625, 627, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980) (holding that a death sentence may not "constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict."); *Chao v. State*, Del. Supr., 604 A.2d 1351, 1359 (1992) (explaining the particular concern of *Beck* that without the "procedural safeguard" of a lesser included charge, jurors may convict in order to punish because they "have determined that a serious crime was committed . . . although not necessarily . . . the crime with which the defendant was charged").

[257] *Beck*, 447 U.S. at 629 (quoting Alabama Code § 13-11-2(a) (1975)) (emphasis supplied). The Court noted that the "last phrase of this subsection has been consistently construed to preclude any lesser included offense instructions in capital

No such prohibition is at issue in this case. The relevant Delaware statute simply states that the trial judge "is not obligated" to charge on lesser included offenses unless the rational basis test is met.[258]

In *Hopper v. Evans*[259], the United States Supreme Court stated:

> *Beck* held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction.[260]

Hopper explicitly upheld Alabama's requirement that there be a "reasonable theory from the evidence" to support a lesser included offense, and held that none was required on the facts of that capital case.[261]

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cases." *Id.* In *Beck*, the State conceded that a lesser included offense instruction would have been given "absent the statutory prohibition." *Id.* at 630.

[258] *See* 11 Del. C. § 206 ("The court is not obligated to charge the jury with respect to an included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense.").

[259] 456 U.S. 605, 102 S. Ct. 2049, 72 L. Ed. 2d 367 (1982).

[260] *Id.* at 611 (emphasis added).

[261] *Id.* at 611-12. *Hopper* also noted the federal rule that a lesser included offense instruction should be given "if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater." *Id.* at 612. (citation omitted).

We have concluded that in this case there is no "rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense."[262] Neither Delaware law nor the Due Process Clause requires the lesser included instructions requested by Capano. Nothing in *Beck* or its progeny supports Capano's argument.

VI. Admission of Evidence of Capano's Character and Prior Misconduct

Capano argues that the trial court improperly admitted evidence of his character during its case-in-chief and during his cross-examination. In particular, he contends that the trial court should have excluded the following evidence under D.R.E. 404: (1) Debbie MacIntyre's testimony that she purchased a handgun for Capano;[263] (2) Tom Shopa's testimony that Capano, while in jail, asked Shopa if he would sleep with MacIntyre;[264] and (3) the State's cross-examination of Capano concerning a racist email that Capano sent to another lawyer,[265] specific instances of "indiscreet" marital infidelity,[266] and Capano's net worth.[267]

We review the trial court's admission of evidence of other bad acts under D.R.E. 404 to determine whether the

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[262] 11 Del C. § 206(c).

[263] Tr. of 11/18/98, at 72-91.

[264] Tr. of 12/1/98, at 58-63.

[265] Tr. of 1/4/99, at 30-32.

[266] Tr. of 1/4/99, at 39, 43-46.

[267] Tr. of 1/4/99, at 46-47.

trial court abused its discretion.[268] In contrast, we review *de novo* a trial court's determination under Rule 404 that "bad act" evidence is relevant to prove something other than the defendant's propensities or that the evidence is related to a "pertinent trait."[269]

A. MacIntyre's Gun Purchase

On direct examination, MacIntyre testified that, on two occasions, Capano asked her to purchase a gun for him and that she eventually did so in May 1996.[270] On appeal, Capano argues that MacIntyre's testimony about the gun purchase is inadmissible under the rule articulated by this Court in *Farmer v. State*.[271] More specifically, he contends that this testimony is inadmissible because: (1) there is no evidence that the gun was involved in Fahey's death and (2) the jury may improperly infer that possession of a gun indicates a disposition to use it.[272] The State responds that the suspicious nature of the purchase is probative evidence that Capano planned to murder Fahey. The trial court agreed with the State and permitted MacIntyre to testify on this issue.[273]

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[268] *See Allen v. State*, Del. Supr., 644 A.2d 982, 985 (1994).

[269] *See Steigler v. State*, Del. Supr., 277 A.2d 662, 668 (1971), vacated on other grounds, 408 U.S. 939 (1972) (reviewing *de novo* relevance of evidence admitted under Rule 404(b)).

[270] Tr. of 11/18/98, at 72-91.

[271] Del. Supr., 698 A.2d 946, 948-49 (1997).

[272] *See Farmer*, 698 A.2d at 949.

[273] Tr. of 10/28/98 Teleconference, at 8-9.

In *Farmer*, the Court held that a gun found in the defendant's house was inadmissible because the State had no evidence connecting that gun or that type of gun to the shooting with which the defendant was charged.[274] The *Farmer* Court recognized that the admission of a gun into evidence may be unfairly prejudicial to the defendant where admission of the gun serves only to support an inference that the defendant had a gun available to him at the time of the shooting.[275]

In contrast, the State's case against Capano of a planned homicide depends on evidence that he "was assembling the wherewithal to commit a homicide."[276] And the suspicious nature of his use of MacIntyre to purchase the gun for him is probative evidence of this planning. Although neither side produced evidence indicating that the gun purchased by MacIntyre was involved in Fahey's death, MacIntyre's gun purchase for Capano is nevertheless independently relevant to prove that he had the gun purchased as part of a plan to murder Fahey and that he sought to cover his tracks by ensuring that he was not the registered owner of the gun.

The issue, of course, is whether the jury will infer from this transaction that Capano is a bad person because he purchased a gun illegally or that Capano possessed a gun and therefore used it to murder Fahey. In *Getz v. State*,[277] this Court established six requirements for the

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[274] *See Farmer*, 698 A.2d at 949.

[275] *See id.*

[276] Tr. of 10/28/98 Teleconference, at 9.

[277] Del. Supr., 538 A.2d 726, 734 (1988).

admission of evidence of a defendant's prior bad acts. The evidence of prior bad acts must be: (1) material to an ultimate issue; (2) admissible under D.R.E. 404(b); (3) proved by clear and convincing evidence; (4) not too remote from the crime charged; (5) not unfairly prejudicial under D.R.E 403; and (6) accompanied by a limiting instruction.

Because MacIntyre's transaction is probative evidence of planning, the dispute centers on the last two *Getz* elements.[278] The first question is whether the danger of unfair prejudice "substantially outweighs" the probative value of the evidence under D.R.E. 403. Although there is a danger of improper jury inferences from Capano's possession of a gun, we find that this risk does not substantially outweigh the probative value of the evidence – particularly in view of the discretion accorded the trial court to decide these issues.[279]

Under the final *Getz* prong, the parties agree that the trial court failed to give a limiting instruction for MacIntyre's testimony. The State suggests, however, that Capano agreed at trial that no such instruction was necessary. The office conference discussions on this point are not crystal clear, but it appears that defense counsel wanted to wait until MacIntyre testified before proposing a limiting instruction.[280] Defense counsel did not repeat

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[278] The State's asserted purpose for presenting this testimony is expressly authorized by D.R.E. 404(b): "Evidence of other crimes, wrongs, or acts . . . may, however, be admissible [to prove] . . . *preparation, plan*. . . . " (emphasis added).

[279] *See Allen v. State*, Del. Supr., 644 A.2d 982, 985 (1994).

[280] Tr. of 11/18/98 Office Conference, at 7-10.

its request later, apparently because counsel thought that an instruction was not necessary.[281] Under these circumstances, we conclude that the trial court's decision to admit MacIntyre's testimony without an instruction did not constitute an abuse of discretion under *Getz*.

B. Shopa's Conversation with Capano

Tom Shopa, who was a close friend of Capano, testified on direct examination that Capano asked him to have a "physical relationship" with Debbie MacIntyre.[282]

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[281] Tr. of 1/7/99 Office Conference, at 21 ("Mr. Maurer: I don't think we need a repeated instruction on the purpose for which the gun was put into evidence. I think that sort – that whole dynamic has been changed by the way the case developed. We gave that instruction initially.").

[282] Tr. of 12/1/98, at 62-63. Shopa's testimony proceeded as follows:

> Q. Did he [Capano] say anything else in regards to Debby MacIntyre to you?
>
> A. He said he was very, if you will – He felt that she was needy, and he wanted me to take care of her, to kind of be there, to help her, to be strong for her, and – and – and also to – to have – have a physical relationship with her, to sleep with her.
>
> Q. And what did you say to him in response to this request, if you will, to have a physical relationship with her?
>
> A. I said no. I refused to. And I was shocked and very upset by that. I didn't express it at that time, but reflecting on it that night, I was very upset about that.
>
> Q. Now at any point did Deborah MacIntyre ask you to have a physical relationship?
>
> A. No.

Capano argues that this testimony is irrelevant and improper character evidence under D.R.E. 404 because it serves only to support an inference that Capano is a bad person. The State contends that Capano's attempt to induce Shopa to sleep with MacIntyre is evidence that Capano sought to "exert continuing control over MacIntyre from prison."

The primary issue surrounding Shopa's testimony is whether the testimony is material to an ultimate issue or whether it bears only on Capano's character.[283] MacIntyre testified that she initially lied to investigators, at Capano's request, about her purchase of a gun for him.[284] Because Capano challenged this testimony on cross-examination,[285] the extent of his control over MacIntyre became a material issue in this case. Shopa's testimony does not prove directly that Capano actually exerted an influence on MacIntyre, but a jury could reasonably infer from the testimony that Capano attempted to control MacIntyre by controlling her personal relationships. We conclude that Shopa's testimony was material to MacIntyre's explanation of events and therefore did not constitute improper character evidence.

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[283] At trial, defense counsel objected to Shopa's testimony on the ground that it was irrelevant because it does not tend to prove that Capano exercised control over MacIntyre. Tr. of 12/1/98 Office Conference, at 7-8.

[284] Tr. of 11/18/98, at 164-65, 172. MacIntyre also testified that Capano requested that she tell investigators that Capano had purchased the cooler for his brother. Tr. of 11/18/98, at 173-74.

[285] Tr. of 11/19/98, at 189-192, 212-225.

Although the testimony does not present Capano in a favorable light, the probative value of the evidence is not substantially outweighed by the risk that the jury will infer from the evidence that he is a bad person.[286] As a result, the trial court did not abuse its discretion in admitting Shopa's account of his conversation with Capano.

C. Cross-Examination of Capano

Capano also contends that the State improperly cross-examined him about (1) a message he sent to a colleague that included racist remarks, (2) specific instances of sexual misconduct, and (3) his net worth. The State's cross-examination questions on these topics, Capano argues, were not relevant and were unfairly prejudicial because they encouraged the jury to make negative inferences about his character under D.R.E. 404(b). The State contends that D.R.E. 404(a)[287] authorizes these lines of questioning because Capano's direct examination testimony placed relevant character traits in dispute.

Rule 404(a)(1) expressly permits the prosecution to use evidence of bad character traits exhibited by the

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[286] *See* D.R.E. 403.

[287] D.R.E. 404(a) provides: "Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except: (1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same."

accused to rebut "evidence of a pertinent trait offered by an accused." This rule, in conjunction with Rule 405(a),[288] extends to the State's use of Capano's prior bad acts to impeach his character evidence. The question therefore becomes whether the three challenged character traits are "pertinent" to this case within the meaning of Rule 404(a).

We emphasize at the outset that the trial judge necessarily has "wide discretion" in ruling on the permissible use of bad acts as impeachment evidence during cross-examination.[289] Nevertheless, to be "pertinent" within the meaning of Rule 404(a), the cross-examination questions must meet one of three conditions. The prior bad acts must either: (1) indicate that a character witness lacks sufficient knowledge of the defendant to render an opinion about the defendant's character;[290] (2) indicate that the defendant is lying about a fact that is relevant to

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[288] D.R.E. 405(a) permits the impeachment of admissible character evidence: "On cross examination, inquiry is allowable into relevant specific instances of conduct."

[289] *See Steigler v. State*, Del. Supr., 277 A.2d 662, 668 (1971), *vacated on other grounds*, 408 U.S. 939 (1972).

[290] *See, e.g., Michelson v. United States*, 335 U.S. 469, 479, 93 L. Ed. 168, 69 S. Ct. 213 (1947) (permitting the prosecution to question character witnesses about the basis of their testimony about the defendant's character and reputation); *United States v. Russo*, 110 F.3d 948, 952 (1997) (permitting prosecution to question character witness about their knowledge of the charges against the defendant).

the case;[291] or (3) indicate that the defendant lied about a specific fact.[292]

In the present case, only the third category applies to the disputed questions because the State sought to impeach Capano's testimony on topics that are not directly relevant to the State's first degree murder case. As the Second Circuit observed in *United States v. Beno*,[293] the State may refute a defendant's lies about specific facts (whether relevant or irrelevant to the case as a whole) because the defendant "should not be allowed to profit by a gratuitously offered misstatement." The court also observed that the rules governing the State's impeachment of the defendant's character evidence do not "suggest[ ] that once a defendant has offered irrelevant and

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[291] *See, e.g., Casalvera v. State*, Del. Supr., 410 A.2d 1369, 1373-74 (1980) (permitting the State to question defendant about unemployment benefits collected in Delaware while defendant was working in New Jersey "to impeach his assertion that he only returned to Delaware out of his concern for the victim"); *Britt v. State*, Del. Supr., 402 A.2d 808, 809 (1979) (permitting State to question defendant about fight with friend 12 hours before arrest to impeach defendant's testimony that he later returned to his friend's home "with a peaceful intent and unarmed").

[292] *See, e.g., McAllister v. State*, 1993 Del. LEXIS 290, *6, Del. Supr., No. 88, 1992, Veasey, C.J., (July 15, 1993) (ORDER) (permitting State to question defendant about prior convictions when he testified that he had only been convicted of five previous crimes because his testimony was "demonstrably false character evidence"); *cf. United States v. Beno*, 2d Cir., 324 F.2d 582, 588 (1963) (stating the rule but finding that the impeachment was improper).

[293] 2d Cir., 324 F.2d 582, 588 (1963).

incompetent evidence on certain specific facts, the prosecution is immediately entitled to explore without restraint and at great length any specific occurrence which might tend to create an abhorrent image of the defendant."[294]

Applying this analysis to the present case, Capano testified during direct examination that he "wasn't prejudiced"[295] and that he was "discreet" in his romantic affairs.[296] The State responded to Capano's testimony that he was not "prejudiced" by questioning him about an email he sent to a colleague that described a person as a "dot head" who "smelled funny."[297] To challenge Capano's assertion that he was "discreet," the State questioned Capano on cross-examination about three specific incidents in which he engaged in sexual conduct that was not discreet.[298]

The trial court permitted these questions because Capano had volunteered information about specific, positive character traits, and the State was entitled to rebut his testimony.[299] We agree with the trial court that Capano was not entitled to "profit by a gratuitously offered misstatement" about his positive character traits. Although the State may not use isolated remarks as a

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[294] *Id.*

[295] Tr. of 12/21/98, at 14.

[296] Tr. of 12/17/98, at 34.

[297] Tr. of 1/4/99, at 32.

[298] Tr. of 1/4/99, at 43-46.

[299] Tr. of 1/4/99, at 31, 43.

means to engage in a lengthy examination of a defendant's past conduct, the State's questioning in the present case described only four specific incidents and was limited to rebutting the specific traits described during direct examination. As a result, we conclude that the State's cross-examination of Capano about his racist remarks and his extramarital affairs was sufficiently brief and targeted to fall within the proper scope of impeachment.

During direct examination, Capano repeatedly asserted that he accepted less pay working in the public sector than he would have received if he had worked for a private law firm.[300] In response, the State presented evidence during its cross-examination indicating that Capano's net worth in 1993 exceeded five million dollars.[301] Although the State's cross-examination was not intended to prove that his testimony was false, the State's questions undermined the apparent purpose of Capano's testimony, *i.e.*, to show that he has a good character because he sacrificed something by accepting reduced pay in the public sector. The State's cross-examination indicated that this pay cut did not require a significant sacrifice by Capano because he was independently wealthy. Although courts generally forbid the admission of the defendant's net worth for consideration by the jury,[302] the trial court did not abuse its broad discretion

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[300] Tr. of 12/16/98, at 24-25, 26-27, 30-32, 34.

[301] Tr. of 1/4/99, at 47.

[302] *See People v. Hogan*, 31 Cal. 3d 815, 647 P.2d 93, 116, 183 Cal. Rptr. 817 (1982), *overruled on other grounds by People v. Cooper*, 53 Cal. 3d 771, 809 P.2d 865, 281 Cal. Rptr. 90 (1991) ("Generally, evidence of the wealth or poverty of a defendant is

by permitting the State to cross-examine Capano on this topic because he described during direct examination the financial sacrifices he made to work in the public sector.[303]

D. Due Process

Capano also presents an argument that the admission of the disputed character evidence violated his right to a fair trial under the Due Process Clause. Because we have concluded that the contested evidence was admissible and relevant under Rule 404, the admission of this evidence does not constitute a violation of the Due Process Clause.[304]

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not admissible. . . . "); *Northwestern Univ. v. Crisp*, 211 Ga. 636, 88 S.E.2d 26, 31 (1955) (same).

[303] We also note that the challenged cross-examination questions present a less serious problem than the sort of questions that this Court has found to be reversible error in the past. *See, e.g., Gregory v. State*, Del. Supr., 616 A.2d 1198, 1203 (1992) (finding trial court committed reversible error in admitting cross-examination of defendant on prior crimes without conducting a D.R.E. 403 balancing and without determining if the crimes indicated dishonesty); *Aiken v. State*, 1994 Del. LEXIS 208, *7-8, Del. Supr., No. 244, 1993, Walsh, J. (June 29, 1994) (ORDER) (finding reversible error in decision to admit evidence of two prior incidents of violence against persons other than victim).

[304] *See Dowling v. United States*, 493 U.S. 342, 353-53, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990) (asserting that improper admission of evidence violates due process if it "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions' ") (citations omitted); *see also Dunnigan v. Keane*, 2d Cir., 137 F.3d 117, 125 (1998) (holding that evidence must be "sufficiently material to provide the basis for

VII. Denial of Motion for Recusal

In May 1999, while this Court had jurisdiction of this appeal, but the matter had been remanded for the trial judge to decide Capano's motion for a new trial, Capano made two requests that Judge William Swain Lee recuse himself in view of Judge Lee's possible candidacy for governor and various newspaper articles highlighting his role in the Capano trial. Judge Lee denied these requests by letters to the parties, stating that his "ability to impartially address [the pending motions] has not been affected by the trial's impact on other aspects of [his] life." On August 20, 1999, a formal motion for recusal was filed. Judge Lee denied the recusal motion on August 24, 1999. The next day, he issued his opinion denying the motion for a new trial.

After several extensions of time, Capano's brief in the appeal of his conviction and sentencing was filed with this Court on February 4, 2000. Just before that filing, Capano filed a motion in this Court for a limited remand of the proceedings to enlarge the record on appeal in connection with the recusal issue. We denied this motion

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conviction" to violate the Due Process Clause). This case is thus distinguishable from *Zebroski v. State*, Del. Supr., 715 A.2d 75, 79 (1998) (noting that the "introduction by the prosecution of racial material in a criminal proceeding violates the Due Process Clauses of both the United States and Delaware Constitutions in cases where the purpose for such introduction is to establish a defendant's abstract belief and/or to create bias against the defendant") (citing *Dawson v. Delaware*, 503 U.S. 159, 166-67, 117 L. Ed. 2d 309, 112 S. Ct. 1093 (1992)).

in an opinion dated March 17, 2000.[305] Instead of interrupting Capano's appeal by staying briefing on the merits in order to conduct an evidentiary hearing that might become an "open-ended fishing expedition,"[306] we directed Capano to file a supplemental brief on the recusal issue together with his other briefing. As we stated:

> The supplemental briefing should address discrete instances of judicial discretion by Judge Lee, the exercise of which may have (a) been motivated by political ambitions; and (b) influenced the outcome of the trial to Capano's prejudice. Assuming that the briefing demonstrates an appropriate issue or issues for factual inquiry, a remand on discrete issues may be necessary. If a remand becomes necessary, we will address these issues in the context of all other issues on appeal. On the other hand, we may never have to reach the issues raised by the motion, depending on the outcome of other aspects of the appeal.[307]

We now consider Capano's argument in the context of his appeal from his conviction and sentence.

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[305] *Capano v. State*, Del. Supr., 758 A.2d 499 (2000). This opinion sets forth the procedural history of the recusal requests and the formal recusal motion made by Capano. For the sake of brevity, this procedural history is not repeated here.

[306] *Id.* at 502.

[307] *Id.* at 504-05. Capano did not file a separate brief on the recusal issue, choosing instead to include this issue in an Amended Appellant's Opening Brief. In addition, Capano filed a supplemental appendix in support of his recusal argument.

A. Capano's Contentions

Capano contends that Judge Lee's ambition to run in the 2000 gubernatorial contest created "the appearance, and, quite probably, the reality that because of political ambition, Judge Lee tilted in favor of both conviction and the death penalty because they were the politically popular outcomes in this widely publicized case."[308] Capano argues that based on the record submitted to this Court, consisting mainly of newspaper articles quoting Judge Lee, it was error for him to deny the motion for recusal, and that we should reverse the conviction and death sentence. Alternatively, Capano continues to argue for a limited remand to conduct a hearing into the factual basis of his argument.

It is necessary to examine the record on which rests Capano's argument and his earlier recusal motion. On May 5, 1999, after sentencing but while a motion for new trial was pending, a news article was published in the Wilmington News Journal under the headline, "Judge William Swain Lee May Run for Governor."[309] In addition, Capano cites a newspaper report containing statements allegedly made by Judge Lee indicating that

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[308] Judge Lee did, in fact, resign his judgeship and retired to seek the Republican Party's nomination for governor, eventually losing the nomination in a close Republican primary.

[309] *See* Nancy Charron, *Judge William Swain Lee may run for governor*, Wilmington News Journal, May 5, 1999, at B1. The article discussed Judge Lee's background and made reference to the Capano case. This revelation appears to have been the impetus for Capano to make his first request to Judge Lee to recusal himself.

Republicans had approached him during Capano's trial to encourage him to consider running for governor.[310]

In suggesting that Judge Lee's political ambitions create a conflict of interest, Capano places particular emphasis on statements by Judge Lee in which he acknowledges the role that the Capano trial played in encouraging his candidacy. One newspaper article reports that in a speech given during Judge Lee's later campaign for the Republican nomination, he credited the Capano case and the guilty verdict for his popularity, saying that if Capano had been acquitted, the Judge would have been seen "as just another judge who failed to see that the system did its job."[311] Another newspaper article reports Lee making similar comments on another occasion.[312] Capano argues that, given the link – belatedly acknowledged by Judge Lee himself – between the Judge's political interests and a completed trial resulting in a guilty verdict, Judge Lee cannot have been impartial when he ruled on the recusal motion and the motion for new trial.

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[310] Todd Spangler, *Lee Who Heard Capano Case, Weighs Run for Governor*, Del. State News, May 6, 1999. Statements in newspaper articles are hearsay, and in most cases their accuracy cannot be assumed. *See Capano v. State*, 758 A.2d 499, 505 (2000) (Hartnett, J., dissenting); Richard E. Flamm, Judicial Disqualification 168 (1996) (noting that as a general rule media reports are considered incompetent sources on which to base a disqualification motion).

[311] Sandy Bauers, *Trial run: From judge's bench to state capital?*, Philadelphia Inquirer, Feb. 20, 2000, at B1.

[312] Tom Eldred, *Lee admits to Capano Blunder in Delaware*, (visited Feb. 15, 2000) <http://www.newszap.com/021500b.html>.

B. Denial of Recusal Not an Abuse of Discretion

Canon 3C(1) of the Delaware Judges' Code of Judicial Conduct provides: "a judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." When faced with a claim of bias or conflict of interest, the judge must follow a two-part analysis:

> First, he must, as a matter of subjective belief, be satisfied that he can proceed to hear the cause free of bias or prejudice concerning that party. Second, even if the judge believes that he has no bias, situations may arise where, actual bias aside, there is the appearance of bias sufficient to cause doubt as to the judge's impartiality.[313]

On appeal of the trial judge's recusal decision, the reviewing court must determine: (i) whether, as a matter of subjective belief, the judge was satisfied that he or she could proceed to hear the case free of bias or prejudice concerning a party; and (ii) whether objectively there is an appearance of personal bias.[314] We must be satisfied that the trial judge engaged in the subjective test and will review the merits of the objective test.[315] The standard of review is abuse of discretion.[316]

We are satisfied that Judge Lee's decision not to recuse himself was a proper exercise of discretion. In response to Capano's first request that he recuse himself,

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[313] *Los v. Los*, Del. Supr., 595 A.2d 381, 384-85 (1991).

[314] *See Jackson v. State*, Del. Supr., 684 A.2d 745, 752-53 (1996) (citing *Los v. Los*, 595 A.2d at 384).

[315] *See id.*

[316] *See id.*

Judge Lee determined that his "ability to impartially address [pending] issues has not been affected by the trial's impact on other aspects of my life." Judge Lee maintained this position in subsequently denying a second recusal request and a later motion for recusal. These responses fulfill the first part of the *Los* analysis described above. Accordingly, we turn to whether there is an objective appearance of bias in this case.

The highly publicized nature of the Capano trial brought all the participants into the public spotlight, a fact that Judge Lee obviously realized. We see no basis, however, to extrapolate the reality or the appearance that Judge Lee was unable to act impartially in all matters pertaining to the guilt and sentencing phase. There is nothing in the record to suggest that political ambitions of Judge Lee affected his ability to preside impartially over the entire proceedings in this case. Moreover, as noted in our opinion of March 17, 2000, we directed the parties to identify and discuss "discrete instances of judicial discretion by Judge Lee, the exercise of which may have (a) been motivated by political ambitions; and (b) influenced the outcome of the trial to Capano's prejudice."[317] In our view Capano has not satisfied this burden. Thus, Judge Lee's refusal to recuse himself, "supported by his subjective belief that he could be impartial"[318] was not an abuse of discretion.

We find that Judge Lee did not violate the provisions of Canon 7 of the Delaware Judges' Code of Judicial

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[317] *Capano v. State*, Del. Supr., 758 A.2d 499, 504 (2000).

[318] *Los*, 595 A.2d at 385.

Conduct. Canon 7A(2) states that a judge "should not . . . make speeches for a political organization or candidate or publicly endorse or oppose a candidate for public office." Canon 7A(3) prohibits judges from several forms of participation in political organizations, including "attending political gatherings."[319] Canon 7C states that "a judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system or the administration of justice."

The Delaware Court on the Judiciary has observed that "a judge should not have to resign merely to learn whether he has a realistic chance of election. . . ."[320] Any exploratory activity, however, must be done "in a manner consistent with the Delaware Judges' Code of Judicial Conduct."[321]

Assuming that during Capano's trial or sentencing, Judge Lee had private conversations with one or more Republican leaders concerning a possible candidacy, such conversations did not violate his obligations under Canon 7. Likewise, assuming that Judge Lee was considering a possible candidacy, there is no evidence that he did so improperly under Canon 7. The Code of Judicial Conduct does not require judges to resign immediately upon conceiving of the possibility of running for office.[322] Nor

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319 *See In re Barrett*, Del. Ct. Jud., 593 A.2d 529, 533-34 (1991) (finding a violation of Canon 7A(3)).

320 *In re Buckson*, Del. Ct. Jud., 610 A.2d 203, 222 (1992).

321 *Id.*

322 In Delaware judges are appointed by the Governor and confirmed by majority vote in the Senate. Del. Const., art. IV, § 3. In states that elect judges however, it is common for judges to

does it disqualify judges who have been assigned to sensitive or well-publicized cases from seeking political office.[323] Capano's argument that Judge Lee acted improperly in this case because he entertained political ambitions has no basis in this record or Capano's proffer on remand.

VIII. Investigation of Allegations of Juror Misconduct

Capano raises two issues on appeal concerning the trial court's resolution of allegations of juror misconduct. First, he contends that the trial court abused its discretion by failing to investigate a dismissed juror's allegations that the remaining jurors had conspired to have the complaining juror removed because his view of the case

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hear cases and conduct trials while up for reelection. Absent extreme circumstances, a judge's candidacy has not been held to require disqualification. *See, e.g., Adkins v. State*, 600 So. 2d 1054, 1061-63 (1990) (holding that it was proper for judge not to recuse himself from capital case even though "he was at the time campaigning for a seat on the circuit court" because defendant had not shown clear evidence of bias). *See Brown v. Doe*, 2d Cir., 2 F.3d 1236, 1248-49 (1993) ("To reverse [the] conviction, this Court would have to rule in effect that no judge who is elected may preside in sensational cases. We reject such a rule as incompatible with federalism.").

[323] Judge Lee was the Resident Judge of Sussex County. His home was two hours distant from the courthouse in Wilmington, New Castle County, where the defendant resided. Judge Lee was assigned to the case by the President Judge. He was a logical choice for the assignment because he was a veteran trial judge, and the fact that he was not a resident of New Castle County enhanced his objectivity, although conducting this ten-week trial necessitated extensive travel for the trial judge at significant personal inconvenience.

differed from their view.[324] Second, he contends that the trial court abused its discretion by refusing to dismiss a juror who participated in a conversation about the case with a juror from another trial and who initiated a conversation with Fahey's sister before the penalty phase of this trial began.

A trial court's determinations on the "mode and depth of investigative hearings into allegations of juror misconduct" and on the remedy for such misconduct are reviewed on appeal to determine whether the court abused its discretion.[325]

A. Juror No. 5

During the trial, the court received two letters from the jury foreperson alleging (1) that Juror No. 5 had expressed his opinions on the case to at least two other jurors and (2) that Juror No. 5 indicated that he had already reached a decision in the case.[326] In response to these allegations, the court interviewed Juror No. 5 in the

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[324] The State argues that Capano did not present this issue to the trial court and therefore waived the issue on appeal. *See* Supr. Ct. R. 8. Although Capano did not demand further investigation at the time of the juror's dismissal, he did properly raise the issue when Juror No. 5 later alleged misconduct by the other jurors. The trial court had the opportunity to consider the allegations in ruling on Capano's motion for a new trial. As a result, Capano did not waive the issue and we review the record for an abuse of discretion.

[325] *Massey v. State*, Del. Supr., 541 A.2d 1254, 1257 (1988) (citations omitted).

[326] Tr. of 12/30/98 Office Conference, at 2-3.

presence of counsel.[327] The trial judge informed the juror of the allegations and identified the complaining jurors.[328] The juror asserted that he had not expressed any opinions to other jurors and that he did not know why the jurors had made the allegations.[329] Nevertheless, with the agreement of all counsel, the court dismissed the juror.

After the trial was completed, Juror No. 5 approached two of Capano's lawyers and suggested that the other jurors had conspired to remove him from the jury because he was inclined to acquit Capano.[330] Based in part on these allegations, Capano moved for a new trial. The trial court again interviewed Juror No. 5 and concluded that the juror's testimony was not credible.[331] The trial judge declined to investigate the matter further and denied Capano's motion for a new trial.[332]

The trial court has broad discretion to determine the extent to which allegations of juror misconduct warrant

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[327] Tr. of 12/30/98 Office Conference, at 10-12.

[328] Tr. of 12/30/98 Office Conference, at 10-12.

[329] Tr. of 12/30/98 Office Conference, at 10-11.

[330] Tr. of 7/8/99 Interview with Juror No. 5, at 10-12. The juror also wrote a letter to the court expressing his disappointment that he had been dismissed, but the court apparently lost the letter and failed to inform counsel of the receipt or contents of the letter. Tr. of 6/22/99 Office Conference, at 18.

[331] *See State v. Capano*, 1999 Del. Super. LEXIS 324, *31, Del. Super., C.A. No. N97-11-0720, 1999 WL 743679 at *9-10, Lee, J. (September 1, 1999) (Mem. Op.).

[332] *See id.*, 1999 Del. Super. LEXIS 324, *32, 1999 WL 743679 at *10.

further investigation.[333] This policy has particular force where the defendant wishes to impeach the jury's verdict with evidence of misconduct.[334]

In the present case, the trial court elected not to investigate further the allegation that members of the jury conspired to have Juror No. 5 removed because he was inclined to acquit Capano. In reaching this decision, the trial judge acted within his broad discretion because he found no credible evidence to suggest that the allegations warranted further investigation. The post-trial testimony of Juror No. 5 was the only evidence of misconduct by other jurors.[335] Moreover, the trial court had a sufficient basis on which to conclude that this testimony was not credible: (1) The juror did not mention the alleged conspiracy during his initial interview with the court or in his 1999 letter to the court and (2) the juror misrepresented the content of his first interview with the trial judge.[336] Although allegations of improper pressure by

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[333] *See Massey v. State*, Del. Supr., 541 A.2d 1254, 1257 (1988).

[334] *See id.* at 1256 (citing D.R.E. 606(b)).

[335] Capano also contends that Juror No. 3, who was dismissed because she had been arrested for drug possession during the trial, suggested that jurors had determined Capano's guilt before the end of the trial. This type of allegation, however, does not automatically warrant further investigation. *See Lovett v. State*, Del. Supr., 516 A.2d 455, 474-75 (1986) (holding that speculation about pressure on the jury to return a guilty verdict and "third hand allegations" that the jury considered facts not in evidence do not require further inquiry into the jury's verdict).

[336] *See Capano*, 1999 Del. Super. LEXIS 324, *27-28, 1999 WL 743679 at *9-10.

other jurors are undoubtedly serious,[337] the trial court did not abuse its discretion in declining to conduct a further investigation into the post-trial allegations of Juror No. 5.[338]

B. Juror No. 4

Juror No. 4 was involved in two separate incidents that raise some questions about her impartiality. First, this juror had a conversation concerning the Capano case with a juror serving on another trial. During an interview

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[337] *See McCloskey v. State*, Del. Supr., 457 A.2d 332, 338-39 (1983) (holding that animosity between jurors and trial court's private interview with foreperson raised presumption of improper pressure on jurors).

[338] *Cf. Sheeran v. State*, Del. Supr., 526 A.2d 886, 897 (1987) ("The effect of the alleged actions of other jurors upon the mind or emotions of the juror who wrote to the trial court, is precisely the kind of intra-jury influence that the prohibition in D.R.E. 606(b) was designed to protect from inquiry. . . . We find the trial judge did not abuse his discretion in refusing to hold an evidentiary hearing as to the allegations set forth in the juror's letter or in refusing to grant a new trial."). Capano argues that the holding in *Fisher v. State*, Del. Supr., 690 A.2d 917, 918 (1996), supports his position that the trial court is obligated to conduct an in-depth investigation of allegations of serious juror misconduct. In *Fisher*, the Court remanded to the trial court for a hearing on possible racial bias among jurors after the trial court "denied summarily" the defendant's motion for a new trial. *Fisher* presents a different situation than the present case because the Capano trial court did not deny Capano's motion for a new trial "summarily." Although the judge did not conduct a juror-by-juror investigation, the judge did not dismiss the allegations out-of-hand. On the contrary, the trial court interviewed the lone complaining juror and concluded that the juror's testimony lacked credibility.

with the trial judge, Juror No. 4 revealed the general tenor, if not the precise contents, of the conversation.[339] Based on this interview, the trial judge concluded that the conversation was "innocent" and did not prejudice Capano.[340]

Second, Juror No. 4 initiated a conversation with Fahey's sister, Kathleen Fahey-Hosey, at a local gym after the guilt phase and just before the penalty phase of the trial began. Juror No. 4 told Fahey-Hosey that she was "really sorry about all this" and that the jury had "prayed for her family" after it came to a decision in the guilt phase.[341] There is no evidence that Fahey's sister made

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[339] Tr. of 10/28/98 Interview with Juror No. 4, at 13-14. The juror testified as follows:

> The first day I get on the bus, everybody's talking about Capano this, and all that, and I was just quiet. An they were talking about – and I assumed they were jurors, too, but I wasn't going to say nothing until I went in and I knew.
>
> And they were talking about the case and they said to me – and the woman said to me, "Are you a juror," and I said, "No," because I didn't – I didn't mean – I mean I didn't know who was listening and I just said no.

[340] Tr. of 10/28/98 Interview with Juror No. 4, at 18.

[341] Tr. of 1/26/99 Interview with Juror No. 4, at 5-6. At this point Juror No. 4 testified:

> I walked over to the Stairmaster. I got on and I started to go and I looked over and I'm standing right next to her [Kathleen Fahey Hosey] and I just – I mean we know each other, I've been looking at her for four months, and I just said hi and she said hello. And I just said I'm really sorry about all this and I said hopefully it will be over soon, and, you know, and

any statement to the juror on the merits of the case. When the court interviewed her, the juror also suggested that she may have already reached a decision on sentencing.[342]

As an initial matter, it would appear that Capano did not object to the retention of Juror No. 4 after the disclosure of her conversations with the other juror or after her contact with Fahey's sister. Although it is unclear from the record when the trial judge revealed that Juror No. 4 discussed Capano's trial with the other juror, Capano waived his objection to the retention of Juror No. 4 by failing to present the issue to the trial court.[343]

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then she told me she was putting her son into IHM school, and I told her that the night that we finally came to our decision, we prayed for her family and that was it. And I mean it was just kind of small talk. It wasn't – I mean she never said anything to me about what she wanted or anything like that. It was nothing. It was nothing like that at all. It was just – I mean I wasn't going to ignore the woman.

. . .

I've never even – and she says, "Do you live around here," and I said, "Yeah, you know, my family's from north Wilmington. And she says, "Oh, are you the school teacher," and I said, "No, I'm the social worker" and I said I work at Mary Campbell Center. And she said "Oh, I'm a physical therapist" and that was – I mean, I said, "Oh, we have a physical therapy department where we work, I wonder if you know Pat Kramer."

[342] Tr. of 1/26/99 Interview with Juror No. 4, at 9.

[343] *See* Supr. Ct. R. 8.

In any event, Capano's claims with respect to Juror No. 4 fail because Capano does not present any evidence that the juror's conversations actually prejudiced his case. To impeach a jury verdict because of juror misconduct, "a defendant must establish actual prejudice unless defendant can show that the circumstances surrounding the misconduct were so egregious and inherently prejudicial as to support a presumption of prejudice to defendant."[344] Moreover, indications that a juror has made up her mind on an issue before the end of the trial – despite repeated admonitions from the trial judge not to do so – do not generally require dismissal of the juror.[345]

In the present case, there is no evidence that Juror No. 4's conversation with the other juror was prejudicial to Capano. Based on the testimony of Juror No. 4 and on the disclosure by the other juror, the trial court could properly conclude that Juror No. 4 did not overhear information about the Capano case during her conversation with the other juror.[346] The trial court could therefore properly retain Juror No. 4 after her contact with the other juror because there was no risk that the juror would

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[344] *Massey v. State*, Del. Supr., 541 A.2d 1254, 1255 (1988).

[345] *See Styler v. State*, Del. Supr., 417 A.2d 948, 953 (1980) (finding that trial judge could properly conclude that statements by two jurors before the end of the trial indicating that they thought that the defendant was guilty was "loose talk" and did not reflect a bias against defendant).

[346] Tr. of 10/28/98 Interview with Juror No. 4, at 18.

base her deliberations on facts outside the evidence adduced in court.[347]

Similarly, although Juror No. 4's conversation with Fahey's sister was completely inappropriate during the course of the Capano trial, it did not indicate an improper bias in favor of Fahey's family. The conversation was relatively brief and did not concern the facts of the case or the jury's verdict.[348] Evidently, the trial court and defense counsel were satisfied with the account, and they agreed to permit Juror No. 4 to remain on the jury for the penalty phase, thus waiving the claim now presented.[349]

Finally, Juror No. 4's comment that "I feel like I've already come to my decision on [sentencing]" was not sufficiently prejudicial to warrant dismissal because she merely indicated an inclination in one (unspecified) direction. Although jurors are consistently admonished not to reach a decision on any issue before the parties have presented all of the evidence, the trial court has discretion to permit a juror to remain as long as the juror does not "express[ ] a firm conclusion that the man was guilty regardless of anything."[350] Juror No. 4, by contrast, agreed that she could "still discuss the aggravating and mitigating circumstances and be open to being convinced

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[347] *Cf. Lovett v. State*, Del. Supr., 516 A.2d 455, 474-75 (1986) (holding that "third hand allegations" that the jury considered facts outside evidence do not require a new trial).

[348] Tr. of 1/26/99 Interview with Juror No. 4, at 5-7. *See* excerpted testimony *supra* note 341.

[349] Tr. of 1/26/99 Interview with Juror No. 4, at 13-14.

[350] *Styler*, 417 A.2d at 953.

by other people who are on the jury."[351] Because Juror No. 4 did not express "a firm conclusion" with respect to Capano's sentence, the trial court did not abuse its discretion by permitting the juror to participate in the penalty phase of Capano's trial.

The trial court could properly find that the incidents described above did not actually prejudice Capano and that they did not taint the jury's verdict. As a result, we conclude that the trial court did not abuse its discretion by declining to pursue further investigations or by refusing to grant Capano's motion for a new trial on the basis of this misconduct.

The courts of this State, and the courts of many other states, go to great pains to insulate jurors from any contact even remotely related to a pending case. Indeed, it is customary practice in Delaware for jurors to wear juror identification badges during a case. It is regrettable from an institutional perspective that these juror mishaps occurred in this case. Although contact between a juror and the victim's family is improper and should not be permitted, there is no indication that the conversation was prejudicial to Capano in this case. We trust, however, that the Superior Court has instituted adequate measures and instructions to ensure that such problems will not occur in other cases in the future.

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[351] Tr. of 1/26/99 Interview with Juror No. 4, at 9.

IX. Questions Concerning Post-Arrest Silence – No Plain Error

Capano argues that questioning during cross-examination concerning his silence at his bail hearing violated his due process rights. Because no objection was raised at trial, we review this claim for plain error.[352] We conclude that the questions complained of were proper.

Capano was arrested on November 17, 1997 for the murder of Fahey. He was indicted on December 12, 1997. A five-day proof positive hearing was held commencing on February 2, 1998, and bail was denied. Trial commenced on October 6, 1998.

In January and February 1998, while Capano was incarcerated awaiting trial, MacIntyre was in contact with investigators. She had testified before the grand jury in September 1996 and was possibly going to be required to appear as a witness at the bail hearing and the proof positive hearing. On January 28, 1998, MacIntyre attended an interview with law enforcement officials and stated under oath that she had thrown away the gun that she had purchased for Capano. This was the same testimony she had previously given before the grand jury.[353] According to MacIntyre, whose testimony at trial was

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[352] *See Wainwright v. State*, Del. Supr., 504 A.2d 1096, 1100 (1986). In a sidebar conference, the State said that "Pre-arrest silence we can use to impeach, and I think the other thing is if you put the letters in that are post-arrest I think you raise the post-arrest issue." A fair reading of the transcript is that Capano's attorneys agreed with that statement.

[353] Tr. of 11/18/98, at 181-92; Tr. of 11/19/98, at 51.

that Capano took and kept the gun,[354] it was at this January 28th interview that she decided not to continue giving a false story to the government.[355] On February 27, 1998, following negotiations between her lawyers and the government, MacIntyre signed an agreement with the State. This agreement protected her from prosecution for prior false statements in exchange for cooperation with the government investigation.[356]

During this period, Capano and MacIntyre exchanged letters. The content of this extensive correspondence was examined in great detail through MacIntyre's and Capano's testimony, including Capano's direct testimony. The admission of these letters is not an issue on appeal. These letters contain "advice" from Capano about how MacIntyre should handle herself with respect to the investigation. He told her, for example, that she was not in danger of being prosecuted for perjury, and that she should hire new lawyers for herself.[357] The jury could reasonably infer from these letters that Capano was attempting to dissuade MacIntyre from cooperating with the government, and to manipulate her testimony.[358]

On direct examination, Capano's counsel read through a number of the letters, asking Capano what they meant. This testimony was clearly intended to bolster the

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[354] Tr. of 11/18/98, at 91-94.

[355] Tr. of 11/19/98, at 220-21.

[356] *Id.* at 54.

[357] Tr. of 11/19/98, at 61-76.

[358] Tr. of 11/18/98 at 207-22; Tr. of 11/19/98, at 29-30; Tr. of 12/29/98, at 30-32.

claim that Capano was "protecting" MacIntyre by not revealing her role in Fahey's death.[359]

In this context, the questioning of Capano regarding his post-arrest silence were proper means of impeachment. These questions and answers are part of the following exchange on cross-examination:

> Q: And then February 27, 1998, after you are arrested, Debbie MacIntyre signs a cooperation agreement with the Government, right?
>
> A: Yes, she does. I didn't hear the date you said.
>
> Q: February 27, 1998?
>
> A: Yeah, I don't know if that's the date she signed. I know that's the date she went in. For all I know she had signed it the day before.
>
> Q: You kept quiet at the bail hearing which preceded this, right? There was a bail hearing in February to decide whether you would stay in jail. You never said she did it, right?
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> A: I never testified.
>
> Q: But you never said it through any means. You never told your attorneys, you never did anything?

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[359] Tr. of 12/29/98, at 34, 53 ("I promised Debby that I would protect her. I was very deeply in love with Debby. I knew what had happened was an accident. And I felt some, you know, obvious sense of responsibility, because if I had been truthful, you know, if I had been kinder on the phone . . . nothing like this would have ever happened. If I had taken the damn gun away from her at some point and just confiscated it from her house.") (testimony of Tom Capano).

A: No, I was true to my word. I was protecting her.

Q: You were protecting her. February 27th she signs a cooperation agreement with the State?

A: Yes.

Q: And you're in jail?

A: Yes.

Q: You have – according to your testimony, it's been horrible conditions that you've endured in jail, right?

A: Very terrible.[360]

The third and fourth questions in this exchange relate to Capano's post-arrest silence. In *Doyle v. Ohio*,[361] the United States Supreme Court held that "use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." The prohibition on questioning regarding post-arrest silence extends beyond a defendant's exercise of his right to silence at the time of arrest to include pre-trial silence generally.[362] The rationale of *Doyle* is that it is "fundamentally unfair" to use a defendant's silence for

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[360] Tr. of 1/4/99, at 102-03.

[361] 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

[362] *See Brecht v. Abrahamson*, 507 U.S. 619, 628-29, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993) ("On the other hand, the State's reference to petitioner's silence after that point in time, or more generally with petitioner's failure to come forward with his version of events *at any time before trial* . . . crossed the *Doyle* line.") (emphasis added); *Hassine v. Zimmerman*, 3d Cir., 160 F.3d 941, 947 (1998) (finding *Doyle* violation where questions went to general pre-trial silence).

impeachment after giving *Miranda* warnings assuring the defendant, "at least implicitly, that his silence will not be used against him. . . . "[363]

The questioning excerpted above does not run afoul of *Doyle* because it did not "impeach the exculpatory story."[364] The State used Capano's silence to impeach him on a discrete issue that Capano himself had raised in order to convince the jury of the veracity of his accident defense. That discrete issue is the meaning of his letters to MacIntyre and what they could tell the jury about his conduct in January and February 1998. This testimony raised a subsidiary issue relative to the alleged accident that occurred on Thursday, June 27, 1996.

As stated above, Capano used his own direct examination to explain the letters, answering such questions as, "Now, what did you mean by protecting someone completely?"[365] In his direct testimony he methodically referenced the letters as they related to his "state of mind" in January and February 1998.[366] Therefore the State was entitled to use his silence to raise the inference that the specific "state of mind" he claimed to have – *i.e.*, a protective one toward MacIntyre – was not credible.[367] Therefore, we find no error.

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[363] *Fletcher v. Grier*, 455 U.S. 603, 606, 71 L. Ed. 2d 490, 102 S. Ct. 1309 (1982) (quoting *Anderson v. Charles*, 447 U.S. 404, 407-08, 65 L. Ed. 2d 222, 100 S. Ct. 2180 (1980)).

[364] *Doyle*, 426 U.S. at 619.

[365] Tr. of 12/29/98, at 54; *see also, e.g., id.* at 58.

[366] Tr. of 12/29/98, at 34.

[367] *Cf. Anderson v. Charles*, 447 U.S. 404, 408, 65 L. Ed. 2d 222, 100 S. Ct. 2180 (1980) (holding that "*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent

Finally, even assuming that there was a *Doyle* violation, permitting the isolated questioning is not plain error. Capano's *pre-arrest* silence following Fahey's death, and his persistent efforts to conceal her death and hide his involvement, were central issues before the jury. As Capano testified, he remained silent about MacIntyre's involvement at great cost to his family and his career, even as his "world was collapsing."[368] Capano's effort at trial was to convince the jury that this was because he loved MacIntyre and would not betray her. Even without the questioning complained of, the jury had to confront the stark fact that Capano remained silent before his arrest despite extraordinary pressures, all in order to "protect" MacIntyre.[369] It is thus inconceivable that two isolated references to Capano's failure to speak at a bail hearing caused any prejudice.

X. *No Brady Violation*

Capano argues that the trial judge was required to disclose to the defense certain sealed documents relating to Gerry Capano's drug usage. The trial judge held an *in camera* review. After that review, the trial court determined that this material was *Brady* material because it constituted impeachment evidence with respect to Gerry,

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statements"); *United States v. Reveles*, 5th Cir., 190 F.3d 678, 685 (1999) ("When a defendant attempts to convince a jury that he was of a cooperative spirit, *Doyle* does not tie the hands of prosecutors who attempt to rebut this presentation by pointing to a lack of cooperation.").

[368] Tr. of 1/4/99, at 102.

[369] *Id.*

in that it contained "information on specific episodes when Gerard purchased and used drugs."[370] The trial court further found that "the material is cumulative evidence of facts in evidence and of which the defense already knows: Gerard purchased and used a large quantity of drugs on a regular basis."[371] Based on this finding, and taking into account that the documents were sealed to protect an informant, the trial court excluded the information contained in the documents.

Capano's claim of a *Brady* violation is without merit. We review for abuse of discretion the decision of the trial court.[372] In this case, Gerry Capano was cross-examined at length and in detail about his history of drug use.[373]

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[370] *State v. Capano*, 1998 Del. Super. LEXIS 335, *4, Del. Super., No. 97-11-0720, 1998 WL 729756, at *1, Lee, J., (Sept. 17, 1998) (ORDER) (citing *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment") and *Giglio v. United States*, 405 U.S. 150, 153-54, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972) (holding that the obligation to disclose under *Brady* applies to matters relevant to the credibility of a witness)); *see also Jackson v. State*, Del. Supr., 770 A.2d 506, 515-17 (2001) (discussing and applying *Brady*).

[371] *Id.* In this appeal we have also examined *in camera* the same material examined by the trial judge, and we come to the same conclusion.

[372] *See Snowden v. State*, Del. Supr., 672 A.2d 1017, 1024 n.6 (1996) ("A trial court's denial of access to the defense, following an *in camera* inspection, is reviewed for abuse of discretion and has generally been affirmed on appeal."); *Lilly v. State*, Del. Supr., 649 A.2d 1055, 1059 (1994).

[373] Tr. of 11/9/98, at 143-86.

Other witnesses gave testimony about Gerry's drug use, including Dr. Tavani, who testified that it affected Gerry's ability to perceive reality. The additional fact that Gerry was testifying pursuant to a plea agreement, and thereby avoiding prosecution on drug-related charges, was also before the jury.[374] Therefore, it was not an abuse of discretion for the trial judge to exclude this evidence on the basis that it was cumulative. Because the evidence is cumulative, Capano cannot show "a Brady violation . . . by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[375]

XI. Propriety of Questions During Cross-Examination of Capano

Capano argues that the State asked improper questions while cross-examining him. First, he argues that the State asked him questions that the prosecutor knew were likely to cause him to invoke his claim of lawyer-client privilege.[376] Second, he argues that the State asked "so-

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[374] *Id.* at 5; Tr. of 11/10/98, at 4, 91.

[375] *Kyles v. Whitley*, 514 U.S. 419, 435, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995).

[376] Capano argues that these questions were improper under Rule 512 of the Delaware Uniform Rules of Evidence. Rule 512 provides that:

> (a) The claim of a privilege, whether in the present proceeding or on a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

called 'were they lying' questions" that unfairly placed him in the position of having to argue that other witnesses had lied. We find no merit to either of these arguments.

As to the first category of claimed error, Capano concedes that no objection was raised at trial and that therefore this Court must apply plain error review.[377] On cross-examination, the State tried to demonstrate Capano's manipulation and control of Debbie MacIntyre. To that end, the State sought to establish that, while incarcerated, Capano asked MacIntyre to fire her own lawyers and hire a lawyer named Jack Willard recommended by Capano.[378]

Apparently Willard had represented Capano at some point. It was in this connection that Capano was asked whether Willard had asserted lawyer-client privilege on Capano's behalf. Capano repeatedly insisted that Willard had not been his attorney at the time Capano tried to get MacIntyre to hire him. The State was merely attempting

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(b) In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without knowledge of the jury.

(c) Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

[377] *See Wainwright v. State*, Del. Supr., 504 A.2d 1096, 1100 (1986). Relief is warranted when "the error complained of [is] so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Id.*

[378] Tr. of 1/4/99, at 4-10.

to rebut Capano on this point by showing that Willard had in fact invoked lawyer-client privilege on behalf of Capano. No adverse inference was drawn from these questions.[379] In this context the questions were not improper because they were intended to explore the Capano-Willard relationship.

Capano also complains of another group of questions in which the prosecutor asked Capano whether he had lied to his lawyers.[380] As Capano concedes, these questions related to false information that he fed his lawyers for public dissemination following Fahey's disappearance while her fate was still unknown. For example, Capano caused his lawyers to issue a press release describing Capano as "devastated" by her disappearance and "hoping she will be found safe."[381] Capano was asked whether these statements were, in effect, "lies" he told to his attorneys. They did not require him to invoke lawyer-client privilege since they related to information that Capano told his lawyers for the purpose of making the information public.[382] Therefore they were not improper.

Capano next complains of certain questions he refers to as "were they lying questions." Such questions may be problematic for the reason that opinions about who is

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[379] *See* D.R.E. 512(a).

[380] Tr. of 1/4/99, at 166-83.

[381] *Id.* at 181.

[382] D.R.E. 502(b) (limiting privilege to confidential communications).

lying and who is not invade the province of the jury[383] or for the reason that it is "misleading and unfair to make it appear that an acquittal requires the conclusion that [a witness] is lying."[384] Some courts, however, have found that "were they lying" questions are not always improper.[385]

Delaware has not adopted a general prohibition on the type of questions at issue here, and we decline to do so now.[386] In this case the questions were not improper

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[383] *See United States v. Boyd*, 312 U.S. App. D.C. 35, 54 F.3d 868, 871 (1995) ("It is therefore error for a prosecutor to induce a witness to testify that another witness, and in particular a government agent, has lied on the stand.").

[384] *State v. Casteneda-Perez*, 61 Wn. App. 354, 810 P.2d 74, 78-79 (1991).

[385] *See, e.g., People v. Overlee*, 236 A.D.2d 133, 666 N.Y.S.2d 572, 577 (1997) (explaining that where witnesses contradict each other, and the contradiction is not attributable to mistake, a credibility contest results and it is proper advocacy for a cross-examiner to highlight it).

[386] We have disapproved of assertions made by the prosecution in closing argument relating to witness credibility, especially when they imply that in order to acquit the defendant the jury would have to find that another witness had lied under oath. *See Fensterer v. State*, Del. Supr., 509 A.2d 1106, 1112 (1986) (holding that comments made by the prosecutor in closing argument were "improper and unacceptable" because they implied that "in order to acquit the defendant . . . the jury would have to find that the officers lied under oath"). *Cf. Hughes v. State*, Del. Supr., 437 A.2d 559, 571 (1981) ("In our opinion, 'liar' is an epithet to be used sparingly in argument to the jury."); *id.* at 570-71 (holding that it was improper for prosecutor to label defendant's "pre-trial out-of-court statements as 'lies,' " and that such characterizations must not be made unless "(a) that is a legitimate inference which may be drawn from the evidence,

and do not warrant a new trial. For instance, Gerry's neighbor Jeffrey Stape testified that he saw Capano parked outside of Gerry's home on the morning of Friday, June 28, 1996, the day that Fahey's body was disposed of at sea. Capano was asked whether Stape had been "mistaken" when he testified that Capano glanced quickly away when Stape spotted him parked in front of Gerry's home the day after the alleged murder.[387] This question was about perception more than credibility, and in any event related to a minor fact. There was certainly nothing improper about this question.

Capano was asked whether he had ever told either Fahey or Kim Lynch-Horstmann (a friend of Fahey) that one of his daughters needed brain surgery. Capano said that he had not. The prosecutor then said: "Kim Horstmann is confused. Anne Marie Fahey is lying to her psychiatrist. And you are to be believed?"[388] This question, however, came after Capano had just testified that the State's contention was a "lie" and that Lynch-Horstmann was "confused."[389] In addition, we note that the question did not force Capano to comment directly on Fahey's credibility; rather, Capano asserted in his answer that Fahey's psychiatrist was not believable when she

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and (b) the prosecutor relates his argument to specific evidence which tends to show that the testimony or statement is a lie.").

[387] Tr. of 12/29/98, at 85-86.

[388] Tr. of 12/30/98, at 165-66.

[389] *See Webb v. State*, Del. Supr., 663 A.2d 452, 463 (1995) (distinguishing the type of comment found improper under *Fensterer* from statements made by prosecutor in response to defendant's own suggestion that a witness was lying).

recorded the information. Therefore this questioning was not improper.

Finally, Capano was asked whether his brother Joseph was lying under oath when he stated that he had asked Capano, "Why didn't you do something about the extortion?"[390] Capano answered by saying "it's possible that he made a mistake,"[391] a response that demonstrates the harmlessness of the question. Finally, we note that throughout the trial Capano himself labeled other witnesses as liars, asserting, for example, that both MacIntyre and Gerry had no credibility. For the foregoing reasons, the trial court's allowing the questions complained of on appeal was not error and does not warrant a new trial.

XII. Personal Opinions of Witnesses as to Capano's Guilt

On direct examination, Brian Fahey, the victim's brother, testified that the Fahey family had filed a civil suit against Capano because they "believed at the time that Tom Capano murdered my sister."[392] He also said that Capano "was responsible for causing my family a great deal of pain, for killing my sister. . . . "[393] Nicholas Perillo, a convicted felon who asserted that Capano had asked him to find someone to burglarize MacIntyre's home, read into evidence his statement to prosecutors

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[390] Tr. of 12/29/98, at 239.

[391] *Id.* at 240.

[392] Tr. of 10/26/98, at 105.

[393] *Id.*

that "Jesus, I think the bastard killed her."[394] Capano did not object to these statements at trial. On appeal, he contends that admission of these personal opinions as to Capano's guilt was plain error.

Neither of these statements jeopardized Capano's right to a fair trial. It is apparent from Brian Fahey's testimony that he had no personal knowledge of what had happened to his sister, Anne Marie. Perillo was a convict, and by virtue of his testimony he was a "jail-house snitch," to use the State's phrase. These opinions do not invite the kind of deference that risks depriving Capano of the right to have the jury make the ultimate determination of his guilt or innocence.[395] Therefore, even assuming that admission of these statements would have been error in the context in which they were admitted if there had been a timely objection by Capano's counsel, Capano was not, in fact, prejudiced and their admission was not plain error.

XIII. Capano's Absence from Office Conferences

Capano contends that he was denied his right to be present at all stages of the trial because he was absent from the daily office conferences at which counsel presented evidentiary and other legal matters to the trial

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[394] Tr. of 11/24/98, at 46.

[395] *Cf. Powell v. State*, Del. Supr., 527 A.2d 276, 279 (1987) (finding plain error where an *expert* witness impugned the credibility of the defendant, thereby invading the province of the jury, and where the expert's particular testimony was "crucial" and a "substantial evidentiary factor" in the prosecution's case).

judge for decision. Because Capano failed to raise an objection at trial concerning his absence from office conferences, the plain error standard of review applies.[396] As a result, the issue is deemed waived unless the error is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[397]

A defendant in a criminal case has a right to be present at trial based on the Sixth Amendment right to confront one's accusers and the common law "privilege of presence" during trial.[398] In Delaware, this right has been enshrined in Superior Court Criminal Rule 43.[399] As Superior Court Criminal Rule 43 indicates, however, the right to be present at trial has definite boundaries.[400] For present purposes, we need note only that Rule 43(c)(3) explicitly states that a defendant's presence is not required "at a conference or argument upon a question of law." Similarly, in *United States v. Smith*,[401] the Third

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[396] *See* Supr. Ct. R. 8. Capano argues that this issue is subject to *de novo* review on appeal. As we describe below, Capano's claim fails under either standard of review.

[397] *Wainwright v. State*, Del. Supr., 504 A.2d 1096, 1100 (1986) (citing *Dutton v. State*, Del. Supr., 452 A.2d 127, 146 (1982)).

[398] *Shaw v. State*, Del. Supr., 282 A.2d 608, 609 (1971).

[399] Rule 43(a) provides: "*Presence Required*. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule."

[400] *See, e.g.*, Super. Ct. Crim. R. 43(b)-(c) (describing situations in which the defendant's presence or continued presence is not required).

[401] 3rd Cir., 186 F.3d 290 (1999).

Circuit defined the scope of a defendant's right to be present at proceedings related to trial:

> Due process mandates that a criminal defendant have an opportunity to attend any proceeding where his presence has a 'relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.' A defendant's presence is a condition of due process, however, only 'to the extent that a fair and just hearing would be thwarted by his absence.'[402]

Because Rule 43 does not require the defendant's presence at office conferences concerning legal issues and because there is no basis to conclude that Capano's absence "thwarted" the fairness of his trial, we find that Capano's absence from the conferences did not violate his Sixth Amendment rights.

Furthermore, because Capano does not allege that he was absent during the "traditional and formal confrontation stage of the trial," he must show that he suffered some prejudice as a result of his absence.[403] Capano has shown no such prejudice. Although Capano was notified

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[402] *Id.* at 296 (internal citations and quotation marks omitted) (quoting *United States v. Gagnon*, 470 U.S. 522, 526, 84 L. Ed. 2d 486, 105 S. Ct. 1482 (1985); citing Fed.R.Crim.P. 43(a) ("defendant shall be present . . . at every stage of the trial")).

[403] *Bass v. State*, Del. Supr., 561 A.2d 466 (1989) (ORDER) (citing *Dutton v. State*, Del. Supr., 452 A.2d 127 (1982)) (distinguishing situations in which a defendant's absence is *per se* reversible error from those situations in which a defendant's absence is reversible error only where the defendant can show prejudice).

of the office conferences,[404] he presents no explanation for his failure to attend them. As a consequence, we conclude that Capano's absence from the conferences was voluntary. Apart from a general suggestion that Capano could have "contributed" to the conferences, there is no argument that his presence would have affected the outcome of the trial or that he was otherwise prejudiced.

We conclude that Capano's absence from the office conferences did not violate his constitutional rights and that Capano cannot show that he suffered prejudice as a result of his absence from the conferences.

XIV. Admission of Adultery Evidence During Impeachment

Capano contends that the trial court permitted the State to impeach defense witnesses' testimony with evidence of marital infidelity but did not permit the defense to impeach the testimony of a prosecution witness with evidence of infidelity. For example, Capano argues that the trial court did not permit the defense to cross-examine a prosecution witness about his extramarital affairs as a means to undermine an inference that Capano arranged for the witness to sleep with Deborah MacIntyre.[405] In contrast, the court permitted the defense to cross-examine Gerry Capano about his extramarital affairs to undermine

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[404] The trial judge announced on the first day of the trial (and on a variety of other occasions) that "on a daily basis, I'm going to be meeting with counsel at 9:30 in my chambers." Tr. of 10/26/98, at 152-53.

[405] Tr. of 11/18/98, at 3-4.

his credibility,[406] and the court permitted the State to cross-examine Tom Capano about incidents involving marital infidelity to rebut Tom's assertion that he was "discreet."[407] Decisions on admissibility are reviewed under an abuse of discretion standard.[408]

Capano's argument that the trial court ruled inconsistently on these issues fails for two reasons. First, the trial court did not prevent defense counsel from questioning State's witness Keith Brady about extramarital affairs. To the contrary, the court permitted defense counsel to ask Brady "whether or not you have been involved in other adulterous relationships and how many" in order to impeach Brady's credibility.[409] The court did, however, limit the extent to which the defense could describe the *details* of these affairs because such details were not relevant to Brady's credibility.[410]

Second, although the court limited the cross-examination of Brady by prohibiting the disclosure of the details of his extramarital affairs, this limitation does not conflict with the court's later ruling that the State could

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[406] Tr. of 11/9/98 Office Conference, at 3-4.

[407] Tr. of 1/4/99, at 43.

[408] *See Floudiotis v. State*, Del. Supr., 726 A.2d 1196, 1202 (1999). Although the State argues that the plain error standard of review applies to this issue because Capano did not raise the "inconsistency" argument below, we find that Capano preserved this issue for appeal by challenging the admission of the contested impeachment evidence at trial. Tr. of 1/4/99, at 41-43. As we describe below, however, Capano's claim fails under either standard.

[409] Tr. of 11/16/98, at 30-31.

[410] Tr. of 11/16/98, at 30-31.

cross-examine Capano concerning specific instances of marital infidelity. Applying D.R.E. 404(a)(1), the trial court permitted the State to discuss particular sexual encounters to impeach Capano's direct examination testimony that he was "discreet" in conducting his extramarital affairs.[411] In exercising his discretion, the trial judge could properly conclude that the impeachment of the credibility of a witness by reference to extramarital affairs does not require disclosure of the details of those affairs, whereas the impeachment of Capano's specific assertion that he was "discreet" does require the limited disclosure of such details.

We therefore conclude that the trial court neither erred nor ruled inconsistently on these issues.

XV. Plain Error – Limits on Allocution

A. Introduction

Under the Delaware death penalty statute, where the defendant pleads not guilty in a capital case and does not waive trial by jury, there must be a trial to determine guilt. If the jury in the guilt phase unanimously renders a verdict of guilty of first degree murder, the same trial judge and jury will then turn to the separate penalty phase hearing. At the penalty phase, evidence is presented relating to mitigating and aggravating circumstances.[412] At the conclusion of the hearing, the jury will report to the trial judge whether the evidence shows

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[411] Tr. of 1/4/99, at 43.

[412] 11 Del. C. § 4209(c)(1).

beyond a reasonable doubt the existence of at least one statutory aggravating circumstance (*e.g.*, premeditation and the result of substantial planning) and whether, by a preponderance of the evidence, the aggravating circumstances outweigh the mitigating circumstances. The jury report carries with it the final tally by number of affirmative and negative votes cast by the jury on each question.[413]

Significantly, the statute also provides that the defendant has the right personally to address the jury in summation in addition to having counsel address the jury in summation on the defendant's behalf:

> At the hearing the Court shall permit argument by the State, the defendant and/or the defendant's counsel, on the punishment to be imposed. Such argument shall consist of opening statements by each, unless waived, opening summation by the State, rebuttal summation by the defendant and/or the defendant's counsel and closing summation by the State.[414]

This statutory provision is complementary to the requirement of the Rules of Criminal Procedure of the Superior Court:

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[413] 11 Del. C. § 4209(c)(3). As the jury was instructed, its answers to these two questions were, in effect, a recommendation for either the death penalty or life imprisonment. *See Manley v. State*, Del. Supr., 709 A.2d 643, 647 n.2 (1998).

[414] 11 Del. C. § 4209(c)(2).

> Before imposing sentence, the court shall . . .
>
> (C) Address the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the evidence.[415]

These statutory and rule provisions are, on their face, broad and open-ended in establishing the framework of the right of allocution belonging to a defendant facing the death penalty personally to address the jury and/or the judge before the determination of the penalty. It is important to focus on the fact that the right of allocution does not involve sworn testimony by the defendant nor does it subject the defendant to cross-examination. Black's Law Dictionary defines allocution as follows:

> allocution . . . 1. A trial judge's formal address to a convicted defendant, asking him or her to speak in mitigation of the sentence to be imposed. • This address is required under Fed. R. Crim. P. 32(c)(3)(C). 2. An unsworn statement from a convicted defendant to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence. • This statement is not subject to cross-examination.[416]

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[415] Super Ct. Crim. R. 32(a)(1)(C). *Compare* Federal Rules of Criminal Procedure 32(c)(3)(C) ("Before imposing sentence, the court must . . . address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence.").

[416] Black's Law Dictionary 75 (7th ed. 1999).

Under Delaware law, the function of the jury in the penalty phase is solely advisory. It is the judge who has the ultimate responsibility to impose either a death sentence or a sentence of life imprisonment without benefit of probation or parole or any other reduction. But the judge must consider and give substantial weight to the recommendation of the jury before imposing sentence.[417] The jury's recommendation is significant, and therefore the conduct of the penalty phase hearing must be conducted fairly. Accordingly, the nature and scope of the right of the defendant personally to address the jury in allocution is one we have recently addressed[418] and one we must now apply to this case.

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[417] 11 Del. C. § 4209(d). In this case, the jury was advised that the trial judge would give its recommendation "great weight." As we have stated, the jury plays an "important role" in the process, *Shelton v. State*, Del. Supr., 652 A.2d 1, 5 (1995), acting "in an advisory capacity as the 'conscience of the community.' " *Wright v. State*, Del. Supr., 633 A.2d 329, 335 (1993) (quoting *State v. Cohen*, Del. Supr., 604 A.2d 846, 856 (1992)). The "trial judge is vested with ultimate sentencing authority," and "may completely reject the recommendation of the jury." *Lawrie v. State*, Del. Supr., 643 A.2d 1336, 1346 (1994) (citations omitted). Delaware's death penalty statute provides that the jury must report its "final vote" on "whether the evidence shows beyond a reasonable doubt the existence of at least 1 aggravating circumstance. . . . " 11 Del. C. § 4209(c)(3). The trial court, "after considering the recommendation of the jury," must find "beyond a reasonable doubt at least 1 statutory aggravating circumstance." *Id.* § 4209(d)(1).

[418] *Shelton v. State*, Del. Supr., 744 A.2d 465, 488-503 (2000); *cert. denied*, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

B. Capano's Exercise of His Right to Allocution

Capano elected his right of allocution January 28, 1999, the last day of his penalty phase hearing. On that day, Capano intended to allocute by reading a prepared statement from the witness stand. Before he began, Capano's counsel informed the trial judge that they had instructed Capano about the law of allocution.[419] Capano's counsel, however, informed the court that Capano had not told them the substance of his allocution.[420] Before Capano began, the trial judge imposed limitations, *without objection*, on the substance of allocution. Outside of the jury's presence, the trial judge explained to Capano that his allocution was limited as follows:

> Allocution is extended only to acceptable expressions of remorse, pleas for leniency, statements about his own good person and plans or hopes for the future. It is not to dispute the evidence or the verdict, to attack the investigation or the prosecutors. These limits are to be strictly enforced. And if in fact they are violated, I will terminate the allocution. . . . "[421]

No objection was raised by Capano or his counsel to these limitations. In fact, as noted, these ground rules had already been explained to Capano by his attorneys.[422]

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[419] Tr. of 1/28/99, at 42.

[420] *Id.* at 11-12.

[421] *Id.* at 42-43.

[422] *Id.* at 42.

Before Capano began to exercise his right of allocution, the trial court related these limitations to the jury, explaining that "a man who is facing the possibility of capital punishment has the right to address his jurors, his judge, not to dispute the facts of the case or to comment on matters related to the trial, but to deal with those areas that are appropriate for you to consider in determining the questions that lie ahead of you."[423]

Capano began his allocution by saying, "I'm not allowed to talk about the evidence, and the next thing I was going to say was about the evidence, so I won't."[424] Again, at a later point in his testimony, he said with reference to a matter concerning his daughters, "I'm not allowed to talk about that evidence. . . . "[425] Finally, at the end of allocution, he said, "There are a couple of other things that I wanted to say but better check and make sure they don't violate any rules. Maybe just one other."[426]

Capano gave a lengthy allocution covering a number of subjects.[427] He alluded to his accident defense, saying, for example, that his actions on the night of June 27 were those of a "panicked man," and were a result of "very

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[423] *Id.* at 43-44.

[424] *Id.* at 45.

[425] *Id.* at 58.

[426] *Id.* at 64.

[427] The State's undisputed estimate is that he spoke in allocution for about 45 minutes. In fact, his allocution is spread over twenty pages of the penalty hearing transcript.

cowardly decisions which I think when I was on the stand before I basically already said that much."[428]

Capano did in fact make some references to the evidence, in spite of the court's limitation. In addition, he discussed his family life, explained his background and personal qualities to the jury, and described his relationship with Fahey, among other things. Thus he had a substantial opportunity to receive the intended benefits of allocution.

Capano raises on this appeal for the first time for plain error review not only the trial judge's limits on discussing the evidence but also the trial court's reaction when Capano entered into a discussion of certain evidence. For example, Capano was discussing his pride in his daughters, and then veered into a discussion of what he viewed as harassment of his daughters, presumably by State officials. He told the jury that "my kids were harassed. They were lied to and. . . . " At this point the trial judge interrupted Capano as follows:

> The Court: We're done. Please take Mr. Capano out of the courtroom.
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> The Defendant: Can I take it back, Your Honor?
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> The Court: No.

The trial judge immediately relented, however, stating in the presence of the jury:

> I will let him continue. Sort of blown my rules apart here and I'll instruct the jury on that, but

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[428] Tr. of 1/28/99, at 48, 49.

> the next time you make such a blatant attack on the rules that you're forced operate under I will remove you. There won't be taking back anything. You will not be present for the rest of the trial.[429]

Later, when Capano began discussing his relationship with Fahey, the trial court interrupted, saying:

> Mr. Capano, if you have any remarks that deal with expressions of remorse, pleas for leniency, plans or hopes for the future, or statements about your own good person, some of which you have already made, please make them now. I will not tolerate any deviance from these conditions.[430]

When Capano left the stand, the trial court delivered the following instruction to the jury:

> Members of the jury, as I indicated before Mr. Capano started his allocution, it's limited to a very narrow framework, specifically the defendant is not permitted to rebut any facts or to deny his guilt or to voice an expression that contradicts the evidentiary facts that you heard in the trial. It is solely for the purpose of acceptable expressions of remorse, pleas for leniency, statements about his own good person, and for his plans and hopes for the future. To the extent that Mr. Capano spoke to those valid areas, you should consider it his testimony. To the extent that he violated the terms of the allocution, which he was specifically informed of prior to

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[429] *Id.* at 59-60. Capano ended his allocution by saying "I'm sorry if I broke the rules." *Id.* at 65.

[430] *Id.* at 62-63.

> taking the stand, you should consider that in any way you deem appropriate.[431]

The trial judge did not explain what he meant by the term "consider that in any way you deem appropriate."

Then, in the presence of the jury, the trial judge asked the prosecution "if the State [has] anything [it] wished to present in view of the deviation from the purposes of allocution." Following a sidebar conference during which the State pressed for an instruction regarding Capano's suggestion that he had been stopped from testifying about certain matters, the Court stated the following to the jury:

> The purpose of the sidebar was for me to reflect on certain statements that were made by Mr. Capano which may have been misleading. Mr. Capano elected the right of allocution, which means that he could take the stand and, within the limitations which I indicated to you, could speak and not be subject to cross examination. There was nothing to permit him or to – excuse me – there was nothing to keep him from taking the stand and testifying on broader issues in the penalty phase; however, had he done that, he would have subjected himself to cross examination. So when he indicated that there were things that he could not talk about, he was right because allocution is very limited, but had a different form been chosen, those limitations would not have been the same.[432]

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[431] *Id.* at 66.

[432] *Id.* at 68-69.

C. *The Sentencing Decision*

The jury returned its recommendations on January 28, 1999.[433] Eleven of the 12 jurors found the existence of the statutory aggravating circumstance that "the murder was premeditated and the result of substantial planning," while one juror did not. The jury found that the aggravating circumstances outweighed the mitigating ones, and recommended by a vote of 10 to 2 that the death penalty be imposed. The trial court sentenced Capano to death on March 16, 1999, based on its finding that the State proved beyond a reasonable doubt the statutory aggravating circumstance that Capano had premeditated and substantially planned Fahey's murder.[434] The trial court also found that the State had proved by substantial and reliable evidence the existence of six non-statutory aggravating circumstances, and that the aggravating circumstances outweighed the five mitigating circumstances that also existed.[435]

One of the nonstatutory aggravating circumstances found by the trial court was the defendant's "disdain for authority."[436] The trial court stated that "it also is noteworthy that defendant breached many rules the Court imposed during these proceedings. The Court, directly, and through counsel, on numerous occasions set forth rules to defendant which it expected him to follow, and

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[433] *See State v. Capano*, 1999 Del. Super. LEXIS 541, *1, Del. Super., No. IN97-11-0720, Lee., J. (March 16, 1999) (Mem. Op.).

[434] 1999 Del. Super. LEXIS 541, *18.

[435] 1999 Del. Super. LEXIS 541, *22.

[436] 1999 Del. Super. LEXIS 541, *11.

defendant consistently violated those rules. He openly defies authority."[437] In remarks accompanying the handing down of the sentence, the trial court noted that in spite of the limits of allocution, Capano had "specifically refused to ask for mercy, showed no remorse, and continued his attack on the decision of the jury [and] the disloyalty of those who testified against him. . . . "[438]

D. Capano's Contentions

Capano argues that his death sentence should be set aside because the trial judge improperly limited the scope of his allocution during the penalty phase of his trial. He argues that he was impermissibly restricted to "expressions of remorse, pleas for leniency, statements about [his] own good character and person and plans and hopes for the future." In addition, Capano contends that the trial judge erred by interrupting him during his allocution and admonishing him in front of the jury for exceeding the scope of the allocution and by commenting to the jury that they could view Capano's exceeding the scope of the allocution "in any way . . . appropriate." Finally, Capano argues that the trial judge erred during sentencing by considering the fact that Capano violated his ruling on the scope of the allocution as a factor in imposing the death sentence.

Capano contends that this Court's standard and scope of review should be *de novo*. Despite his failure to object, Capano asserts that his resistance to the judge's

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[437] 1999 Del. Super. LEXIS 541, *14-15.

[438] Tr. of 5/16/99, at 7.

attempt to limit his right to allocution calls for a less deferential standard of review than plain error. Regardless of the standard, Capano contends that this Court should review his claim because the right to allocution is "arguably a 'substantial right' of a capital defendant."[439] The State contends the standard and scope of review is plain error. We agree that plain error is the standard and scope of review.

The issue we consider is whether the trial judge committed plain error in his limitations on Capano's allocution, in the judge's reactions to Capano's attempts to discuss evidence, made in the jury's presence, and in the judge's direct statements to the jury. The State conceded at oral argument in this Court that the trial judge's limitations on allocution were erroneously restricted and that the court's comments "probably did" affect the jury's attitude toward Capano.[440] Nevertheless, it was proper for the jury to consider any violations of courtroom rules as a nonstatutory aggravating factor in its recommendation.[441] The issue that concerns us here is the likely effect on the jury of the trial judge's reactions to those "violations."

We are mindful of the trial judge's "duty to act instantly to control disrespectful or obstructionist tactics in the courtroom."[442] A trial judge has "broad latitude" to

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[439] *See Shelton v. State*, Del. Supr., 744 A.2d 465, 497 n. 142 (2000).

[440] Tr. of October 24, 2000 Oral Argument in the Supreme Court, at 30.

[441] *See* 11 Del. C. § 4209(c).

[442] *Smith v. State*, Del. Supr., 560 A.2d 1004, 1009 (1989).

take measures to "preserve order and appropriate conduct in judicial proceedings."[443] In this case, the trial judge's remarks at sentencing and the sentencing opinion reflect that he found Capano to be a continually disruptive and unruly presence.[444]

The trial judge has a unique vantage point, and we do not undertake to second-guess his assessment. We further recognize that the challenge of managing a difficult litigant is magnified in the context of a lengthy capital trial subject to intense public scrutiny.[445] The trial in this case began on October 6, 1998 and ended on January 17, 1999, a period of nearly three months. The trial judge firmly and ably maintained control over these most difficult proceedings and moved the trial forward expeditiously.

Our task is to assess the likely effect of the trial judge's statements on the fairness and integrity of Capano's penalty phase. Our review of the record convinces us that the totality of the trial judge's handling of the allocution did not unfairly prejudice Capano.

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[443] *Id.* at 1008, 1009; *see also State v. Bennefield*, Del. Supr, 567 A.2d 863, 864 (1989) (discussing trial court's obligation to ensure that final arguments are not improper); *Dutton v. State*, Del. Supr., 452 A.2d 127, 140 (1982) (finding no error in trial judge's response to what he viewed as a breach of required professional etiquette).

[444] *See supra* note 437.

[445] *See* Managing Notorious Trials 17 (National Center For State Courts) (2d ed. 1998) (stating that "the existence of media and public interest in notorious cases intensifies the difficulty" of "maintaining the appearance of impartiality, ensuring a fair trial, and maintaining control of the courtroom").

E. The Shelton Jurisprudence

On June 25, 1999, while Capano's direct appeal to this Court was pending, we released an opinion in *Shelton v. State*.[446] In *Shelton*, the defendant was instructed by the trial judge that he could not use his allocution to "talk about the facts surrounding the murder." [447] The trial court instead limited Shelton's allocution to "asking the sentencing authority . . . to give you mercy, spare your life in this case, and sentence you to life." Shelton acquiesced in that limitation because he did not want to discuss the facts in any event. Speaking briefly in allocution, Shelton did not discuss any evidence.[448] Shelton was sentenced to death for first degree murder and his death sentence was affirmed by this Court on direct appeal.[449]

In his motion for post-conviction relief, Shelton argued for the first time that the trial court had infringed his right to present mitigating evidence to the jury in allocution. Shelton argued that this right was guaranteed under Superior Court Criminal Rule 32 as well as the Eighth and Fourteenth Amendments of the United States

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[446] Del. Supr., 744 A.2d 465 (2000), *cert. denied*, 120 S. Ct. 2225 (2000). A motion for reargument was filed and denied by this Court. In connection with the denial of the motion, we released a revised opinion. *See Shelton v. State*, Del. Supr., 744 A.2d 465 (Jan. 5, 2000).

[447] *Id.* at 490.

[448] *Id.*

[449] *Outten v. State*, Del. Supr., 650 A.2d 1291 (1994), *cert. denied*, 515 U.S. 1145, 115 S. Ct. 2585, 132 L. Ed. 2d 834 (1995).

Constitution. According to Shelton, his counsel had rendered ineffective assistance by failing to object to the limitations placed on his allocution.[450]

Despite Shelton's clear assent to the limits placed on allocution, we reached the merits of his claim under a plain error standard of review.[451] We concluded that the limitations placed on Shelton's allocution did not reflect the full scope of allocution under Delaware law.[452] We defined the scope of allocution as follows:

> There is no blanket rule that would preclude a defendant who wished to do so from discussing or arguing in allocution facts already in evidence either in the guilt phase or the penalty phase.
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> ***
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> In our view, Superior Court Criminal Rule 32(a)(1)(C) and 11 Del. C. § 4209(c)(2) provide a *defendant in the penalty phase of a capital case the opportunity to argue in allocution from the facts already in evidence in the guilt phase or the penalty phase why those facts should not result in the death penalty*. This is true whether the argument is to

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[450] *Shelton*, 744 A.2d at 488.

[451] In *Shelton*, the scope of allocution was an issue of "first impression." 744 A.2d at 497 n.142. Therefore, although the defendant had acquiesced in the limitations placed on his allocution, the Court decided to "waive the waiver rule." *Id.*

[452] *Shelton* addressed the common-law right of allocution based on Delaware Superior Court Criminal Rule 32 and 11 Del. C. § 4209(c)(2). *Shelton*, 744 A.2d at 495. We declined to address whether the federal constitution "provide[s] a right of a capital defendant to make before the jury an unsworn statement that is not subject to cross examination." *Id.*

> assert diminished responsibility, reduced culpability in comparison to other defendants, mistaken identity, mistake by the jury in finding guilt or any other reason.[453]

Thus, the *Shelton* holding allows a defendant to discuss in allocution facts already in evidence, but requires that the defendant be "sworn and subject to cross-examination" before making a "statement of new evidence."[454] We indicated that this limitation on the presentation of new evidence achieved a balance of the important purposes served by allocution, considerations of fairness toward the defendant as well as the State and the truth-seeking function of the jury.[455]

In *Shelton*, we explained the purposes served by allocution:

> Presently, allocution serves two purposes: "First, it reflects our commonly-held belief that our civilization should afford every defendant an opportunity to ask for mercy. Second, it permits a defendant to impress a jury with his or her feelings of remorse." Put another way, allocution is necessary because it affords "an opportunity for the jury to learn about the 'whole person' " and "it bespeaks our common humanity that a defendant not be sentenced to death by a jury 'which has never heard the sound of his voice.' "[456]

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[453] *Id.* at 496, 498 (emphasis supplied).

[454] *Id.* at 496.

[455] *Id.*

[456] *Shelton*, 744 A.2d at 492 (citations omitted).

The importance of allowing a defendant to discuss evidence in his allocution must be measured in light of these purposes. In some cases, such as the *Shelton* case itself, the defendant may have no wish to refer to the facts of the crime for which he was found guilty. In other cases, however, discussing the evidence presented at trial may be a crucial part of the defendant's plea for mercy.

Although this evidence may have been before the jury in the guilt phase, the purpose of allocution is for the defendant to be heard under procedures that allow him to speak directly to the jury. In fact, the Delaware death penalty statute expressly permits the defendant as well as his counsel to present "argument" and "summation,"[457] and the Superior Court Rule permits the defendant to present "any information in mitigation."[458] In *Shelton*, we quoted with approval Justice Frankfurter's observation that "the most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself."[459] This policy is a key factor in analyzing the right of allocution and its application to this case.

The issue in *Shelton* was first raised in a post-conviction proceeding in that case. The question at that stage of the proceedings was whether Shelton was entitled to a new penalty hearing because of the alleged ineffective assistance of counsel in failing either to object to the

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[457] 11 Del. C. § 4209(c)(2).

[458] Super. Ct. Crim. R. 32(a)(1)(C).

[459] *Shelton*, 744 A.2d at 492 (quoting *Green v. United States*, 365 U.S. 301, 304, 5 L. Ed. 2d 670, 81 S. Ct. 653 (1961); *see also*, 744 A.2d at 515 (Hartnett and Berger, Justices, dissenting).

overbroad and erroneous limits the trial court had placed on his allocution or to raise the issue on direct appeal. We held that he was not entitled to a new penalty hearing because "he was unable to show that he was prejudiced" by the erroneous limitations.[460] This was because Shelton's "considered strategy"[461] was to avoid discussing in allocution the facts of the case. Not only had he made no proffer of what facts he would argue in allocution if allowed, his wish *not* to discuss the facts surrounding the murder had been made unusually clear through extensive colloquy among the judge, Shelton and counsel.[462]

Shelton's strategy was carried out in his actual allocution, during which Shelton did not discuss the facts or express remorse. Twice he stated in his allocution that he was not pleading for his life. Therefore, the limits placed on allocution and trial counsel's failure to object to those limits became a moot point that resulted in harmless error, and thus were not grounds for overturning the sentence.

F. Plain Error Review in This Case

Capano argues that the limits placed on his allocution were error in light of *Shelton*. Neither Capano nor his

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460 744 A.2d at 499.

461 *Id.* at 498.

462 *See id.* at 497-98 ("We are faced with a very unusual case where the record reveals as plain as glass that the defendant consciously decided, after methodical questioning by the trial judge and statements on the record by his counsel, that he was not going to present mitigating circumstances.").

counsel objected to the limits placed on his allocution. Under plain error review,[463] the Court will grant relief only if the error complained of is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." To establish plain error, Capano has the burden of showing actual prejudice.[464]

As noted above, *Shelton* was not decided until after Capano was sentenced. Nevertheless, the State concedes that the limitations placed on Capano's right of allocution were too restrictive in light of *Shelton*.[465] Although it thus concedes error, the State argues that the trial judge's limits on allocution were not plain error in this case. First, the State seems to contend that *Shelton* should not be applied because it was decided after Capano was sentenced. The rationale of the State's argument is that because the scope of the right of allocution was unclear before *Shelton* was decided, and was an issue of first impression in *Shelton*, the error in this case cannot have been "plain" – *i.e.*, obvious.

This argument misconceives the nature of plain error review. Plain errors must be "apparent on the face of the record."[466] As suggested by this language, the issue is

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[463] *Wainwright v. State*, Del. Supr., 504 A.2d 1096, 1100 (1986) (citations omitted).

[464] *See Stevenson v. State*, Del. Supr., 709 A.2d 619, 633 (1998).

[465] *See* Tr. of 10/24/00 Oral Argument in the Supreme Court, at 29.

[466] *Wainwright*, 504 A.2d at 1100; *see also Johnson v. United States*, 520 U.S. 461, 117 S. Ct. 1544, 1548, 137 L. Ed. 2d 718 (1997) (noting that to be "plain" an error must be "clear" or

whether the error is apparent from the vantage point of the *appellate court* in reviewing the trial record, not whether it was apparent to the *trial* court in light of then-existing law.[467] In this case, it is apparent, and conceded by the State, that the limitations imposed on the right of allocution accorded Capano are inconsistent with the right of allocution established in *Shelton*.

The trial judge in the case before us was, of course, unaware when he imposed limits on Capano's allocution of what we were later to decide in *Shelton*. His error, therefore, was understandable. Accordingly, the fact that *Shelton* was decided after Capano's penalty hearing is not itself a bar to a finding of plain error, but that analysis requires a showing of unfairness and substantial prejudice to Capano.

"obvious.") (quoting *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 1777, 123 L. Ed. 2d 508 (1993)).

[467] *See Johnson*, 117 S. Ct. at 1549 (holding that "it is enough that an error be 'plain' at the time of appellate consideration," even when "the law at the time of trial was settled and clearly contrary to the law at the time of appeal"). As the Seventh Circuit has explained, a primary reason for the requirement of 'plainness' is that the appellate court on direct appeal is ill positioned to review contested issues of fact or undeveloped issues of law. *See United States v. Caputo*, 7th Cir., 978 F.2d 972, 975 (1992) ("An error is not plain in the sense of egregious if isn't even clear that it was an error, and if that isn't clear the appellate court is likely to encounter difficulty in determining that an error occurred at all.") In this case, the legal error is perfectly clear in light of current law. *Cf. Shea v. Louisiana*, 470 U.S. 51, 105 S. Ct. 1065, 1070, 84 L. Ed. 2d 38 (1985) (holding that "principled decisionmaking and fairness to similarly situated petitioners require application of a new rule to all cases pending on direct review.")

The State also contends that there is no plain error because this Court has not definitively declared allocution a "substantial right." *Shelton* held that on the facts of that case the defendant had not shown that he was prejudiced by the limits placed on his allocution. Shelton was carrying out his own strategy – however misguided that strategy might have been – not to discuss the facts of the case as developed in the guilt phase.

We held in *Shelton* that "it does not follow, however, that a trial judge's setting of parameters on allocution similar to this one [in Shelton's case] would not be reversible error in a proper case where objection to the limitation was preserved, where there was plain error, or where there was a showing of ineffective assistance of counsel and resulting prejudice to the defendant."[468] We also noted – although determination of the point was not necessary to the decision in *Shelton* – that the right to allocution "is arguably a substantial right of a capital defendant."[469]

We also held that whether the right of allocution is a *substantial* right in a given case, it is not a *constitutional* right under the state or federal constitution. This Court stated in *Shelton* that the right to allocution "is not a right granted by either the federal or state constitutions, [but rather] . . . a right that is grounded solely on the Superior Court Criminal Rule, the Delaware death penalty statute and Delaware decisional law."[470]

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[468] *Shelton*, 744 A.2d at 498.

[469] *Id.* at 497 n.142.

[470] 744 A.2d at 495.

In the context of plain error review, the defendant must show that the error affected substantial rights.[471] Under the federal plain error rule, the phrase "affecting substantial rights" means "in most cases . . . that the error must have been prejudicial: It must have affected the outcome of the [trial] court proceedings."[472] To say that a right is not substantial may be merely another way of saying that the defendant cannot have been prejudiced by an erroneous abridgment of that right. We need not engage in an abstract analysis of whether allocution is a "substantial right." Rather, consistent with this Court's plain error jurisprudence, we must decide whether the error that occurred in this case prejudiced Capano when viewed in the total context of the record relating to the allocution issue.[473]

G. The Issue Whether Capano Was Unduly Prejudiced

Capano argues that his death sentence should be reversed because the trial judge improperly imposed restrictions on his allocution and because he "paid an enormous price for the trial judge's error" during the penalty phase. Capano contends that his allocution "deteriorated into an ongoing battle between [him] and the trial judge." The record shows that this is not the case.

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[471] *See* Super. Ct. Crim. R. 52(b) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").

[472] *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 1778, 123 L. Ed. 2d 508 (1993).

[473] *See Stevenson v. State*, Del. Supr., 709 A.2d 619, 633 (1998).

There are at least three important distinctions from *Shelton* that are relevant to our evaluation of this case in light of the *Shelton* jurisprudence.

(1) Capano had already told his story to this jury in extensive direct testimony and cross-examination in the guilt phase, whereas Shelton did not testify in his guilt phase. This, in and of itself, is not dispositive, but it is a factor that plays into our plain error review of how far the trial judge must permit the defendant to go in allocution in rehashing and arguing the effect of admitted evidence.

(2) The main purpose of allocution is to permit a defendant to present in his own "halting eloquence" his remorse, personal life or diminished culpability (relative to other perpetrators) to a jury that may not have "heard the sound of his voice."[474] That policy may have applied to *Shelton* (but for his express waiver). Capano, on the other hand, was a trained lawyer with trial experience.

(3) Judicial control of the proceedings was clearly at issue here and not in *Shelton*. Shelton himself was an unsophisticated defendant who was confused but nonetheless clearly and expressly waived his allocution right to argue the facts. Capano, on the other hand, was a trained lawyer. Apparently, the trial judge thought Capano was attempting to manipulate the system and needed to be reined in. Although the trial judge may have

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[474] *Shelton v. State*, Del. Supr., 744 A.2d 465, 515 n.258 (2000) (Hartnett and Berger, JJ., dissenting) (citing *Green v. United States*, 365 U.S. 301, 304, 5 L. Ed. 2d 670, 81 S. Ct. 653 (1961)); Shelton, 744 A.2d at 492 n.118 (citing *State v. Zola*, 112 N.J. 384, 548 A.2d 1022, 1046 (1988) (citations omitted)).

been harsh in rebuking him in the presence of the jury,[475] we must evaluate the colloquies that took place during the penalty phase in the context of Capano's performance during the entire three-month trial, including his testimony in the guilt phase and his allocution in the penalty phase.

The State argues that here, as in *Shelton*, the limitations had no effect on Capano's allocution. According to the State: (a) Capano did manage to discuss *some* evidence in his lengthy allocution in disregard of the limitations imposed by trial court; and (b) Capano's tactics and comportment during both trial and allocution may well have alienated the jury and foreclosed an argument that he was prejudiced by limits placed on allocution.[476] The

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[475] Capano calls his allocution an "unmitigated disaster," saying that it "deteriorated into an ongoing battle between Capano and the trial judge," during which Capano was "fiercely denigrated by the trial judge in front of the jury for what is now conceded to have been judicial error."

[476] *See* Tr. of 10/24/00 Oral Argument in the Supreme Court, at 31-32:

> Mr. Wharton: It really strains the ability [sic] to believe that Mr. Capano did not really have an opportunity to say everything he wanted to say, whether it be in allocution or whether it be in his trial testimony. He testified for some eight days. He allocated for some 45-50 minutes on a wide range of subjects.
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> And his attempts to further belittle individuals in the courtroom would not play well with the jury. So really, the argument becomes, well, if only Mr. Capano could have talked longer and said more, he

State also argues that the trial court's attempts to control Capano and enforce the limitations on allocution were appropriate efforts to deal with Capano's transgressions and maintain control of the proceedings.[477]

Capano contends that the trial judge's rebukes of him for violating the erroneous limits on his allocution substantially prejudiced him. Specifically, he argues that the ongoing dispute between Capano and the trial judge risked conveying to the jury that the trial judge felt personal animus toward Capano. In the circumstances, he contends that this atmosphere would likely have affected the jury's deliberations.[478] This is a capital case that

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could have saved his life.

In fact, the exact opposite is true. The more he talked, the worse it became for him.

[477] *See Smith v. State*, Del. Supr., 560 A.2d 1004, 1009 (1989) (stating that trial judges "should be mindful of their duty to act instantly to control disrespectful or obstructionist tactics in the courtroom").

[478] *See, e.g., Childress v. State*, Del. Supr., 721 A.2d 929, 932 n.11 (1998) ("A Trial Judge has a duty to avoid any language or any conduct that would lead the jury to suspect that the judge is favorable to one party to the trial.") (citations and internal quotations omitted); *Callahan v. Cardinal Glennon Hosp.*, Mo. Supr., 863 S.W.2d 852, 867 (1993) (*en banc*) (noting that "a judge exerts great influence over the jury"); *Jefferson-El v. State*, 330 Md. 99, 622 A.2d 737, 741 (1993) (noting that a judge's "opinion or manifestations thereof usually will significantly impact the jury's verdict"); *Starr v. United States*, 153 U.S. 614, 14 S. Ct. 919, 923, 38 L. Ed. 841 (1894) ("It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling.").

resulted in a death sentence, based in part at least, on the jury's recommendation. Death cases are different from other cases and require heightened sensitivity to the finality of the punishment and scrupulously fair process in the penalty phase.[479] Notwithstanding these concerns, we find that the trial judge did not commit plain error.

We focus on four important factors that lead us to conclude, in these circumstances, that the trial court applied a rational, although erroneous, standard when it instructed Capano on the limitations on the scope of his allocution and informed the jury that it had done so.

First, *Shelton* does not mean that there is an almost limitless boundary to the right of allocution. During the penalty phase, to the extent that a defendant seeks to present new matters of relevance that go beyond the record in the guilt phase, thus exceeding the limited parameters permitted in allocution, the defendant must testify under oath and be subjected to cross-examination.

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[479] *See Barrow v. State*, Del. Supr., 749 A.2d 1230, 1249 (2000) ("The imposition of the death penalty requires scrupulous adherence to the constitutional standards that authorize its use."). Also, as Justice O'Connor has stated:

> Because sentences of death are "qualitatively different" from prison sentences, this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.

Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 878, 71 L. Ed. 2d 1 (1982) (O'Connor, J., concurring) (citation omitted).

Second, the trial judge was endeavoring to help the jury focus on "those areas that are appropriate for you to consider in determining the questions that lie ahead of you."[480] The questions for determination by the jury at the penalty phase do not include a re-examination of their decision that, beyond a reasonable doubt, Capano had intentionally murdered Anne Marie Fahey.

Third, Capano not only failed to make a proffer, as he should have, regarding the scope of his intended allocution, but also he refused to inform his own counsel – who otherwise may have had the responsibility to do so as officers of the court. His counsel had informed the trial judge that while Capano wished to exercise his right to allocution, "I have no idea what he is going to say. He won't tell me."[481] Capano's own maneuvering raised a red flag to the trial judge that trouble loomed ahead.

Fourth, Capano did discuss facts that had been admitted in evidence in the guilt phase. We believe that when facts relate to a capital defendant's attempt to display remorse, to minimize the circumstances that relate to aggravation, to diminish degrees of culpability relative to other perpetrators (not applicable here, of course), or to establish a basis for mercy, those facts admitted into evidence at the guilt phase can be drawn upon to support the jury's focus on "the questions that lie ahead."

The trial judge, in our view, appropriately attempted to establish rational guideposts in light of the anticipated

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[480] Tr. of 1/28/99, at 43-44.

[481] *Id.* at 11.

uncertainty. He attempted, as an experienced trial judge managing a difficult case and an unpredictable defendant, to keep the defendant and the jury properly focused on the objective of the penalty phase.

Throughout Capano's allocution, and despite the limitations set by the trial judge, Capano referred to the facts of the case.[482] In so doing, he consistently deflected responsibility for Fahey's death. He demonstrated disdain for expressing remorse, eschewed a plea for leniency, and spoke little of his good character and person or his plans and hopes for the future. His discussion in his allocution of the facts adduced at the guilt phase was not used to advance the purpose of allocution at all.

Capano is not a typical defendant, nor is he an unsophisticated defendant. He is a sophisticated lawyer, trained and experienced in the law and the public domain. He consciously avoided making a proffer of his remarks, refused to tell his counsel of his plans, heard *and* accepted the trial judge's rulings *without objection* and then intentionally and purposefully violated the parameters of the rulings he accepted.

In his sentencing decision, the trial judge found that "the evidence showed defendant is manipulative, controlling, vindictive. His need for control over those around him is overwhelming."[483] The trial judge added: "It is also noteworthy that defendant breached many rules the Court imposed during these proceedings. The Court,

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[482] *See* Tr. of 1/28/99, at 44-65.

[483] *State v. Capano*, 1999 Del. Super. LEXIS 541, *13, Del. Super., No. IN97-11-0720, Lee., J. (March 16, 1999) (Mem. Op.).

directly, and through counsel, on numerous occasions set forth rules to defendant which it expected him to follow, and defendant consistently violated those rules. He openly defies authority."[484]

Capano claims that his allocution became an "unmitigated disaster" because the trial judge maintained control over him. The trial judge showed understandable frustration with Capano's antics, and may have been harsh in his rebukes, but he also showed patience and restraint with Capano. Indeed, Capano's counsel admitted that the trial judge showed restraint despite Capano's repeated violations of the court's ruling on the scope of the allocution.[485]

Capano also argues that the trial judge improperly considered Capano's allocution when imposing the sentence of death. During the sentencing hearing, the trial judge summarized Capano's behavior and attitude during the entire trial. While lengthy, the quote below is important to understand the context in which the statements that Capano complains about were made:

> In the end, the defendant claimed the right of allocution, the ancient avenue of a convicted criminal facing death to accept responsibility, express remorse, and ask for mercy, relying upon his good and contrite character to gain that mercy.
>
> As a lawyer, specifically instructed by his own lawyers on the limits of allocution, and further admonished by the Court before and during

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[484] 1999 Del. Super. LEXIS 541, *14-15.

[485] Tr. of 1/28/99, at 59-60.

allocution, he specifically refused to ask for mercy, showed no remorse, and continued his attack on the decision of the jury, the disloyalty of those who testified against him, and the tactics of the investigators who assembled and presented the case against him, all specific violations of the right of allocution.

The selfishness, arrogance and manipulativeness of Thomas Capano destroyed his own family as well as the Fahey family. He did not hesitate to use his family to commit or suborn perjury or to ask for the mercy he specifically refused to ask for himself. His only remorse is for himself.

The most powerful mitigation presented does not involve the defendant. Rather, it is the impact on his remarkable daughters and a brother he involved in his criminal activities and then ridiculed and excommunicated from the family when guilt and circumstances forced him to tell the truth.

Tom Capano does not face judgment today because his friends and family failed him. He faces judgment because he is a ruthless murderer who feels compassion for no one, and remorse only for the circumstances he finds himself in.

He is a malignant force from whom no one he deems disloyal or adversarial can be secure, even if he is incarcerated for the rest of his life.

The trial judge did not emasculate Capano's right to allocution by considering his behavior or attitude during

allocution.[486] Capano failed to adhere to the purpose of allocution. Although the limitations in the instructions were erroneous and although the trial judge may have been harsh in his reactions to Capano's antics, it was Capano alone who destroyed his opportunity to present evidence in mitigation. Instead, he used the opportunity to vilify others and transfer responsibility for Fahey's death.

The error of the trial judge in limiting Capano's right to discuss proper facts is harmless. In fact, it is a moot point for two reasons: First, Capano did not want to discuss *proper* facts; he wanted to assail people and institutions. This is not an acceptable use of the right of allocution. Second, he did in fact discuss a number of matters despite the trial court's limitations, and he was thus able to put before the jury much of what he wanted them to hear – although it is doubtful that he helped his own case. If there was any prejudice to Capano in the allocution episode, it was primarily self-inflicted.

Accordingly, we hold that as a matter of Delaware's law of allocution, any erroneous limitations placed on Capano's right of allocution and the trial judge's colloquy with Capano in front of the jury, although regrettable, did not prejudice Capano and do not entitle him to a new penalty hearing.

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[486] *See, e.g., United States v. Hildebrand*, 8th Cir., 152 F.3d 756, 766 (1998) (drawing similar conclusion); *United States v. Li*, 2d Cir., 115 F.3d 125, 134 (1997) (same).

XVI. Constitutionality of Delaware's Death Penalty Statute

Capano raises two challenges to the constitutionality of Delaware's statutory death penalty process. He first contends that the process violates his right to a jury trial because a trial judge may apply the death penalty under 11 Del. C. § 4209 where, as in this case, the jury did not *unanimously* find a statutory aggravating factor. Capano also argues that Delaware's sentencing procedure violates the Fourteenth Amendment Due Process Clause because it permits the trial judge to find a statutory aggravating factor without being bound by a jury verdict on the underlying issues of fact. This Court reviews *de novo* claims alleging that the trial court's decision to sentence Capano to death violated Capano's constitutional rights.[487]

A. Right to a Jury Trial as Applied to the Penalty Hearing under the Delaware Death Penalty Statute

We note at the outset that the Delaware death penalty statute, like those of several other states, expressly contemplates non-unanimous and non-binding jury recommendations.[488] We must therefore determine whether a

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[487] *See Williamson v. State*, Del. Supr., 707 A.2d 350, 354 (1998) (asserting that decisions implicating a constitutionally protected right are subject to *de novo* review in this Court).

[488] 11 Del. C. § 4209, provides that "The jury shall report . . . its final vote by the number of each affirmative and negative votes" on "whether the evidence shows beyond a reasonable doubt the existence of at least 1 aggravating circumstance. . . . " 11 Del. C. § 4209(c)(3). The trial court, "after

defendant's right to a jury trial under Article I, Section 4 of the Delaware Constitution necessarily implies a right to a unanimous jury verdict on all facts.[489]

The Delaware Constitution guarantees that "trial by jury shall be as heretofore."[490] This phrase incorporates by reference the common law right to trial by jury, and "any analysis of the right to a trial by jury, as it is guaranteed by the Delaware Constitution, requires an examination of the common law."[491] Based on a common law analysis, this Court has previously found that under the Delaware Constitution, "unanimity of the jurors is . . . required to reach a verdict."[492] This jurisprudence relates to the determination of guilt. Undertaking a similar

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considering the recommendation of the jury," must then establish the existence "beyond a reasonable doubt [of] at least 1 statutory aggravating circumstance." *Id.* § 4209(d)(1).

[489] There is nothing in Delaware jurisprudence to support Capano's suggestion that the phrase "reasonable doubt" in the death penalty statute is intended to mean "unanimous verdict." Indeed, Capano did not cite Delaware cases to support his contention, but instead relied on decisions from other jurisdictions. *See, e.g., State v. Brown*, 138 N.J. 481, 651 A.2d 19, 33 (1994) ("We perceive the requirement of proof beyond a reasonable doubt as practically, if not theoretically, synonymous with the requirement of unanimity."), *overruled on other grounds by State v. Cooper*, 151 N.J. 326, 700 A.2d 306, 331-32 (1997); *Fugate v. State*, 263 Ga. 260, 431 S.E.2d 104, 108 (1993) (same). It is worth noting that *Brown* applies the New Jersey Death Penalty Act, which requires a unanimous verdict for aggravating circumstances. *See* N.J. Stat. § 2C:11-3(C)(3)(c).

[490] Del. Const., art. I, § 4.

[491] *Claudio v. State*, Del. Supr., 585 A.2d 1278, 1298 (1991).

[492] *Fountain v. State*, Del. Supr., 275 A.2d 251, 251 (1971).

inquiry in *State v. Cohen*,[493] however, we held that the right to trial by jury under the Delaware Constitution does not guarantee "the right . . . to have a jury determine punishment in a capital case."[494] Instead, the *Cohen* Court found that "the jury's historic role was limited to that of a trier of facts, *determining guilt or innocence.*"[495]

We therefore conclude that the jury is not required to return a unanimous finding of an aggravating factor in its advisory role during the penalty phase. Although a jury's advisory report on statutory aggravating circumstances necessarily requires the jury to resolve factual disputes, this exercise is fundamentally different from a jury's fact-finding role in the guilt phase under the common law.[496]

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[493] Del. Supr., 604 A.2d 846, 851-52 (1992).

[494] *Cohen*, 604 A.2d at 852.

[495] *Id.* (emphasis added); *see also Apprendi v. New Jersey*, 530 U.S. 466, 478-79 & n.4, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000) (noting that, at common law, " 'after trial and conviction are past,' the defendant is submitted to 'judgment' by the court") (quoting 4 W. Blackstone, Commentaries on the Laws of England 368 (1769)).

[496] *Cf. Spaziano v. Florida*, 468 U.S. 447, 459, 82 L. Ed. 2d 340, 104 S. Ct. 3154 (1984) ("The fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause . . . does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial."). Capano suggests that *Jones v. United States*, 526 U.S. 227, 250-51, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999) (discussing *Hildwin v. Florida*, 490 U.S. 638, 640-41, 104 L. Ed. 2d 728, 109 S. Ct. 2055 (1989)), endorses the position that, in making a sentencing recommendation under a death penalty statute similar to Delaware's statute, a jury "necessarily engag[es] in the fact finding required for imposition of a higher sentence." Yet *Jones* also discusses a more recent case finding that, under the Sixth

First, as noted earlier, a jury at common law was charged with finding facts only in connection with a determination of guilt or innocence.[497] Here, the jury unanimously determined Capano's guilt beyond a reasonable doubt. By contrast, under Delaware's death penalty statute, a jury makes only recommendations relevant to punishment. Second, a jury's verdict at common law is binding – rather than advisory – as long as its conclusions are rational.[498] Under the Delaware death penalty statute, however, a jury in the penalty phase "functions only in an advisory capacity" and as the "conscience of the community."[499] Put differently, Section 4209 assigns to the trial judge "the ultimate responsibility for determining

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Amendment, a statute may confer on the trial judge the authority to determine the presence of aggravating factors and to sentence a defendant to death without the benefit of a jury verdict or recommendation. *See Walton v. Arizona*, 497 U.S. 639, 647-48, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990). If a trial judge can make sentencing determinations under *Walton* and can disregard a jury's recommendation under *Spaziano*, 468 U.S. at 464-65, there is no reason to think that the jury's recommendation under the Delaware statute constitutes "factfinding *required* for imposition of a higher sentence." *Jones*, 526 U.S. at 250 (emphasis added).

[497] *See Cohen*, 604 A.2d at 852.

[498] A trial court may never disregard a jury's acquittal and it may disregard a jury's conviction only if no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979), quoted in *Davis v. State*, Del. Supr., 453 A.2d 802, 803 (1982) (*per curiam*); 443 U.S. at 318 n.10 ("The factfinder in a criminal case has traditionally been permitted to enter an unassailable but unreasonable verdict of 'not guilty.' ").

[499] *Cohen*, 604 A.2d at 849, 856.

whether the defendant will be sentenced to life imprisonment or death."[500]

Based on these considerations, we conclude that a jury's advisory report under the Delaware death penalty statute does not fit within the jury's common law role as fact-finder. As a result, the jury's recommendations under Section 4209 are not subject to the unanimity requirement, and Capano is therefore not entitled to a unanimous jury finding as to the existence of a statutory aggravating factor before the trial judge imposes a death sentence.

B. Application to the Death Penalty Statute of the United States Supreme Court's Decision in Apprendi

Capano's second constitutional challenge to Delaware's death penalty procedure is based on the United States Supreme Court's recent decision in *Apprendi v. New*

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[500] *Id.* at 849. The United States Supreme Court has held that this arrangement is permissible under the Sixth Amendment. *See Hildwin v. Florida*, 490 U.S. 638, 640-41, 104 L. Ed. 2d 728, 109 S. Ct. 2055 (1989) ("The Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury."). Similarly, the Eighth Amendment to the federal constitution does not require that the statute " 'define the weight the sentencing judge must accord to an advisory jury verdict.' " *Dawson v. State*, Del. Supr., 673 A.2d 1186, 1196 (1996) (quoting *Harris v. Alabama*, 513 U.S. 504, 512, 130 L. Ed. 2d 1004, 115 S. Ct. 1031 (1995).

Jersey.[501] Under Capano's reading of *Apprendi*, the Delaware statute violates the Due Process Clause because it permits the trial judge to find a statutory aggravating factor without being bound by a jury verdict on the underlying issues of fact. Capano's argument thus concludes that, in the language of the *Apprendi* decision, the Delaware statute "remove[s] from the jury the assessment of facts that *increase* the prescribed range of penalties to which the defendant is *exposed*."[502]

But here, the penalty phase did not "increase" Capano's "exposure" to the "prescribed range of penalties." His exposure to the death penalty had already been determined when the jury unanimously returned the verdict of guilt beyond a reasonable doubt of first degree murder.

The New Jersey statute at issue in *Apprendi* was not a death penalty statute, and the holding in *Apprendi* does not bear on any issue involved in this case. The statute there was designed to provide punishment beyond the statutory maximum for the underlying crime where the criminal conduct was motivated by animus against minority groups. After a jury finds a defendant guilty of a statutory crime, the New Jersey statute provides for a separate proceeding in which the trial judge alone is authorized to impose an additional sentence beyond the statutory maximum.[503]

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[501] 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

[502] *Apprendi*, 530 U.S. at 490 (emphasis added).

[503] 530 U.S. at 468-69, 491.

Under the New Jersey statute struck down in *Apprendi*, the judge may impose the additional sentence if the judge finds by a preponderance of the evidence that the defendant's motivation in committing the underlying crime was to intimidate the victim based on the victim's race, gender, or religion.[504] The Supreme Court invalidated the New Jersey statute on the ground that the statute constituted an additional element of the underlying crime – *i.e.*, the defendant's motivation – that must be submitted to a jury and proven beyond a reasonable doubt before the maximum authorized penalty may be increased.[505]

In our view, *Apprendi* neither explicitly nor implicitly invalidates the Delaware death penalty statute. First and most important, the *Apprendi* Court explicitly preserved the line of cases upholding death penalty procedures similar to Section 4209:

> This Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death.[506]

The dissent in *Apprendi* characterizes this analysis as too formalistic because "the Arizona first-degree murder

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[504] *See id.*

[505] *See*, 530 U.S. at 490-98.

[506] *Id.* at 496 (citing *Walton v. Arizona*, 497 U.S. 639, 647-49, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990)).

statute [in *Walton v. Arizona*] authorizes a maximum penalty of death only in a formal sense."[507] In reality, the dissent argues, "the Arizona sentencing scheme removes from the jury the assessment of a fact that determines whether the defendant can receive that maximum punishment."[508] Although this analysis may present a valid criticism of the majority's reasoning, the fact remains that a majority of the Court concluded that the holding in *Apprendi* did not disturb the line of decisions approving of death penalty statutes like that in Delaware.

Even if the Supreme Court had not *explicitly* preserved the death penalty cases, the language in *Apprendi* makes it clear that the Court did not intend to disturb the holdings in these cases. Notwithstanding the dissent's concern over their perception of the breadth of the majority's reasoning, the holding in *Apprendi* is narrow: "Other than the fact of a prior conviction, any fact that *increases the penalty* for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a

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[507] 530 U.S. at 540 (O'Connor, J., dissenting). In *Walton*, the Supreme Court upheld Arizona's death penalty statute. Under the Arizona scheme, once a jury returns a guilty verdict for first degree murder, the trial court holds a separate sentencing hearing to determine whether aggravating and mitigating factors are present. *See Walton*, 497 U.S. at 643-44. The trial court is directed to impose a death sentence where the court finds beyond a reasonable doubt that one aggravating factor is present and where the court finds that the mitigating factors do not outweigh the aggravating factors. *See id.* This statute is thus similar to the Delaware procedure under section 4209.

[508] 530 U.S. at 541.

reasonable doubt."[509] Moreover, the Court previously held that "the finding of aggravating facts fall[s] within the traditional scope of capital sentencing as a choice between a greater and a lesser penalty, *not as a process of raising the ceiling of the sentencing range available.*"[510]

Under Delaware's death penalty procedure, when a jury finds a defendant guilty of first degree murder, the jury *authorizes* the statutory maximum penalty: the death sentence, subject to the penalty phase and the judge's decision on sentencing. Once the jury during the guilt phase of the trial authorizes the maximum penalty, " 'it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed. . . . ' "[511] We therefore conclude that the holding in *Apprendi* does not implicitly or explicitly affect the Supreme Court's previous decisions permitting judges to

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[509] 530 U.S. at 490 (emphasis added). Evidently the consideration motivating the Court in its decision was the fear that a defendant would not have notice of the full extent of the potential penalty from the face of the indictment. Under the Due Process Clause, a defendant may not be subject to additional penalties beyond the prescribed statutory maximum on the basis of additional elements that are not mentioned in the definition of the charged crimes and that are proven only by a preponderance of the evidence. *See id.* at 478-79 ("The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime.") (citing 4 W. Blackstone, Commentaries on the Laws of England 369-70 (1769)).

[510] *Jones v. United States*, 526 U.S. 227, 251, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999) (emphasis added).

[511] *Apprendi*, 530 U.S. at 497 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 257 n.2, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998) (Scalia, J., dissenting)).

find statutory aggravating factors without a jury verdict on the underlying factual questions.

The New Jersey statute that was struck down in *Apprendi* is also distinguishable from Delaware's death penalty statute. The aggravating factors described in Delaware's Section 4209 do not constitute additional elements needed to establish guilt of a "capital murder" offense that a jury must unanimously find beyond a reasonable doubt. These aggravating factors relate only to the penalty phase where the jury acts as an advisory body to the sentencing judge. The *Apprendi* Court distinguished an "element" of a crime from a "sentencing factor" according to whether "the required finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict."[512] As we noted earlier, a conviction at the guilt phase by a unanimous jury under the first degree murder statute constitutes the *authorization* for the later imposition of the death penalty.[513] Because the finding of an aggravating factor does not "expose the defendant to a greater punishment than that *authorized*" by a first degree murder conviction, the aggravating factor is not an additional element of the first degree murder offense.[514] In addition, the Delaware statute requires that the trial judge find aggravating circumstances beyond a reasonable doubt.[515] The New Jersey hate crime statute, by contrast, required a finding by a

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[512] *Apprendi*, 530 U.S. at 494.

[513] *See* 11 Del. C. § 636(b) (referring to 11 Del. C. § 4209).

[514] *Apprendi*, 530 U.S. at 494 (emphasis added).

[515] *See* 11 Del. C. § 4209(d)(1)(a).

preponderance of the evidence that the underlying crime was motivated by a desire to intimidate.[516]

Accordingly, we conclude that the death penalty process in 11 Del. C. § 4209 does not violate the right to a trial by jury under the Delaware Constitution and does not violate the Due Process Clause of the Fourteenth Amendment.

XVII. Aggravating Circumstance Instruction

Capano argues that the aggravating circumstance instruction given to the jury in connection with its sentencing recommendation was erroneous. According to Capano, this instruction defined the relevant aggravating circumstance in such a way as to allow the jury to recommend the death penalty if it found the same degree of intent required to convict of first degree murder.

Review of this claim is *de novo*.[517] We do not agree with Capano's argument because we find that the instruction in this case sufficiently narrowed the class of people eligible for the death sentence.

The statutory aggravating circumstance in question is that "the murder was premeditated and the result of substantial planning."[518] In making a sentencing

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[516] *See Apprendi*, 530 U.S. at 468-69, 491.

[517] *See Chance v. State*, Del. Supr., 685 A.2d 351, 354 (1996).

[518] 11 Del. C. § 4209(e)u.

recommendation, the jury was required to answer two questions. First, whether this aggravating circumstance existed.[519] Second, whether the aggravating circumstances it found (statutory or nonstatutory) outweighed any mitigating circumstances it found.[520] In this case, the jury found by a vote of 11 to 1 that the statutory aggravating circumstance existed. The jury also found by a vote of 10 to 2 that the aggravating circumstances in the case outweighed the mitigating circumstances also present.[521]

The aggravating circumstance instruction delivered by the trial judge to the jury in this case is as follows:

> This statutory aggravating circumstance requires a finding of premeditation. In order for a murder to be premeditated, the defendant must have thought about it, considered it, or deliberated about it beforehand. The design to kill must arise from the sedate, deliberative process and not a rash or impulsive, though intentional act. This statutory aggravating circumstance also requires that the murder was the result of substantial planning. Substantial

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[519] 11 Del. C. § 4209(c)(3)a.1. The trial judge can impose the death penalty only if the judge finds beyond a reasonable doubt the existence of at least one statutory aggravating circumstance and finds that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist. *See* 11 Del. C. § 4209(d)(1).

[520] 11 Del. C. § 4209(c)(3)a.2.

[521] As the jury was instructed, its answers to these two questions were, in effect, a recommendation for either the death penalty or life imprisonment. *See Manley v. State*, Del. Supr., 709 A.2d 643, 647 n.2 (1998).

> planning is planning which is considerable or ample for the commission of the crime.[522]

We find no merit in Capano's argument that this instruction fails to distinguish for the jury between the aggravating circumstance of "premeditation" and "substantial planning" and the "intent" element of first degree murder.

Due process requires aggravating circumstances to "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[523] The aggravating

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[522] Tr. of 1/28/99, at 126. The instruction requested by Capano is as follows:

> This statutory aggravating circumstance applies to those murders which may be characterized as executions (or contract murders). This statutory aggravating circumstance requires a finding of heightened premeditation, i.e., a cold-blooded intent to kill that is more contemplative, more methodical, more calculating and controlled than that necessary to sustain a conviction of first degree murder.

This instruction is drawn from *State v. Manley*, 1997 Del. Super. LEXIS 5, Del. Super., 1997 Del. Super., Cr. I.D. Nos. 9511007022, 9511006992, Barron, J. (Jan. 10, 1997) (ORDER). *See also Stevenson v. State*, Del. Supr., 709 A.2d 619, 637-38 (1998) (noting that this instruction is "based upon . . . guidance from Florida's jurisprudence"). Our tacit approval of this instruction in *Stevenson* does not entitle all capital defendants to an identical definition of the aggravating circumstance codified at 11 Del. C. § 4209(e)(1)u.

[523] *Lewis v. Jeffers*, 497 U.S. 764, 776, 111 L. Ed. 2d 606, 110 S. Ct. 3092 (1990) (quoting *Zant v. Stephens*, 462 U.S. 862, 877, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983)).

circumstances must "permit the sentencer to make a principled distinction between those who deserve the death penalty and those who do not."[524] In determining whether these criteria are met, "we find the relevant inquiry to be whether 'the sentencer fairly could conclude that an aggravating circumstance [in this case, as defined in the jury instructions] applies to every defendant eligible for the death sentence. . . . ' "[525]

The instruction in this case fulfilled these criteria. The instruction defines the aggravating circumstance in a way that excludes intentional killings that are not a result of calm deliberation and preparation. The instruction requires that the planning be substantial, *i.e.*, "considerable or ample," not merely the amount of planning necessary for the act resulting in death.[526] Moreover, the instruction specifically excludes killings that are "rash or impulsive, though intentional." In contrast, a first degree murder conviction requires only that the killing be intentional.[527] Therefore, Capano's argument is without merit.

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[524] *Id.* (citation omitted).

[525] *Steckel v. State*, Del. Supr., 711 A.2d 5, 13 (1998) (quoting *Arave v. Creech*, 507 U.S. 463, 474, 123 L. Ed. 2d 188, 113 S. Ct. 1534 (1993)); *see also id.* ("After review of § 4209(e)(1), we conclude that no one of those factors could be applied to every defendant convicted of first degree murder in Delaware.").

[526] *See United States v. Tipton*, 4th Cir., 90 F.3d 861, 896 (1996) (approving instruction requiring "substantial planning and premeditation," with "substantial planning" defined as "planning that is considerable, or ample for the commission of a crime at issue in this case: murder").

[527] *See* 11 Del. C. § 231 (a) ("A person acts intentionally with respect to an element when: (1) . . . it is the person's conscious object to engage in conduct of that nature or cause that result.").

XVIII. Statutorily Mandated Review of Capano's Death Sentence

This Court must conduct a mandatory, limited review of the Superior Court's imposition of the death sentence.[528] Under 11 Del. C. § 4209(g)(2)b, we must examine the evidence in the record to determine whether it supports the Superior Court's finding of a statutory aggravating circumstance. We must then address both determinations required by subparagraph a. of Section 4209(g)(2).[529] Under this analysis, we first consider whether the imposition of the death penalty was arbitrary or capricious. Second, we consider whether the death penalty in the present case was disproportionate to that imposed in similar cases. When undertaking these inquiries, we must consider as a whole the aggravating and mitigating evidence as it bears upon the circumstances of the crime and the character of the defendant.[530]

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[528] *See* 11 Del. C. § 4209(g); *Zebroski v. State*, Del. Supr., 715 A.2d 75, 82 (1998).

[529] 11 Del. C. § 4209(g)(2) provides in pertinent part:

> The Supreme Court shall limit its review under this section to the recommendation on and imposition of the penalty of death and shall determine: a. Whether, considering the totality of evidence in aggravation and mitigation which bears upon the particular circumstances or details of the offense and the character and propensities of the offender, the death penalty was either arbitrarily or capriciously imposed or recommended, or disproportionate to the penalty recommended or imposed in similar cases arising under this section.

[530] *See Zebroski*, 715 A.2d at 82-83; *Wright v. State*, Del. Supr., 633 A.2d 329, 339 (1993) (citing 11 Del. C. § 4209(g)(2)a.).

A. Statutory Aggravating Circumstance

Capano does not argue that the evidence was insufficient to support the Superior Court's finding of a statutory aggravating circumstance. The jury found by a vote of 11 to 1 that "the murder was premeditated and the result of substantial planning."[531] The trial court found that the State had proven this statutory aggravating factor beyond a reasonable doubt. There was substantial evidence, which has been discussed at length in sections of this Opinion, to support this finding.

B. Death Penalty Not Arbitrary or Capricious

This Court must review the death sentence to consider whether the imposition of the death sentence was arbitrary or capricious. Capano does not argue that it was. Nonetheless, we find that the record "reflects that the Superior Court's decision to impose the death penalty was 'the product of a deliberate, rational and logical deductive process.' "[532] The court recognized that, in determining the punishment, the weighing of aggravating and mitigating circumstances is qualitative not

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[531] 11 Del. C. § 4209(e)(1)u. As discussed above, the trial court gave a correct instruction to the jury defining this aggravating circumstance.

[532] *Steckel v. State*, Del. Supr., 711 A.2d 5, 14 (1998) (quoting *Ferguson v. State*, Del. Supr., 642 A.2d 772, 778 (1994) (quoting *Red Dog v. State*, Del. Supr., 616 A.2d 298, 310 (1992))).

quantitative and must take into account the totality of the circumstances present.[533]

In addition to the statutory aggravating circumstance, the trial court found that the State had proved by substantial and reliable evidence the existence of the following non-statutory aggravating circumstances: "1) Substantial impact of the murder upon friends, family and co-workers of Fahey; 2) Past actions of defendant seeking to harm an ex-lover;[534] 3) Defendant's vindictiveness; 4) Defendant's criminal conspiracies;[535] 5) Defendant's continuing manipulative behavior; 6) Defendant's lack of remorse; 7) Defendant's disdain for authority; and

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[533] *See State v. Capano*, 1999 Del. Super. LEXIS 541, *24, Del. Super., No. IN97-11-0720, Lee., J. (March 16, 1999) (Mem. Op.). *See State v. Cohen*, Del. Supr., 604 A.2d 846, 849 (1992) (stating that the balancing of aggravating and mitigating circumstances involves "reasoned judgment as to what factual situations require the imposition of the death and which can be satisfied by life imprisonment in light of the totality of the circumstances present").

[534] A former lover, Linda Marandola, testified at the sentencing hearing to a pattern of harassment by Capano over a number of years, in the 1970s and 1980s, including sending her letters telling her to leave Delaware, and making harassing phone calls. Tr. of 1/20/99, at 79-95, 165-66. At one point in 1993 Capano talked to a third party about hiring someone to hurt an ex-lover, apparently Marandola. *See id.* at 167-74.

[535] Perillo, a fellow inmate of Capano's, testified at trial that Capano sought Perillo's help in finding someone to burglarize MacIntyre's house. Tr. of 11/24/98, at 56-58.

8) Defendant remains a threat to direct crimes of vengeance while incarcerated."[536]

The trial court also found the existence of six mitigating factors: "1) Defendant's lack of any prior criminal record; 2) The need for his daughters to have him in their lives; 3) The need for his mother to have him in her life; 4) The need of other family members to have him in their lives; 5) The intense guilt which Louis and, particularly, Gerard would feel for their part in participating in these proceedings which might result in defendant's death; and 6) Defendant's community service."[537]

The Superior Court carefully weighed the aggravating and mitigating circumstances in this case, articulating the grounds for its decision to impose the death penalty. The court concluded (in part) as follows:

> Defendant planned, over a period of time, to kill Anne Marie Fahey and to dispose of her body so that it could not be found. He then blamed the murder on an ex-lover who had testified against him. The crime defendant committed was horrific. The crime epitomized the makeup of his character: vindictive and controlling.
>
> * * *
>
> The circumstances of the murder here are similar to those in Gattis. No one, except the defendant, ever will know exactly how or why Anne Marie Fahey died. What is certain is that it was not a crime of passion but, rather, a crime of control. By all accounts, she had ceased to be

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[536] *Capano*, 1999 Del. Super. LEXIS 541, *21-22.

[537] 1999 Del. Super. LEXIS 541, *23.

defendant's lover but had never escaped his sphere of influence, control and manipulation. Defendant's premeditation and planning was for a contingency that, perhaps, he hoped would never happen, but did, on the evening of June 27, 1996. He chose to destroy a possession rather than lose it; to execute an escaping chattel.

The only mitigating circumstances of significance to this Court concern defendant's daughters and the impact of the crime on Gerard. Defendant's daughters' love for their father is deep and genuine and they want him in their lives. However, during this trial, defendant has shown that he will take advantage of his daughters to accomplish an end which benefits himself. Their love for him is great. However, since defendant's past history is a prime indicator of his future behavior, it is clear that defendant poses a threat of harm to his daughters' well-being.

Gerard does not want defendant sentenced to death; he will feel great responsibility for it. Gerard bears no blame; instead, the blame goes directly to defendant. Defendant involved Gerard in his murder plans. Defendant committed the murder. Defendant is the one who must accept all blame, but does not because of his flawed character. Gerard should understand that defendant is reacting in his normal way: to strike out at the disloyal subject and punish that person who attempts to do what is right and not immoral.

Absent the harm to his daughters and to Gerard, there is nothing in defendant's life which would

> call for the imposition of a life sentence. Defendant will not adjust well in prison; he will constantly scheme to by-pass prison rules; he will defy prison authority; he will continue to manipulate those who love him from within the prison walls. He poses a threat of harm even while incarcerated. He committed a horrific crime. That crime and his antisocial behavior outweigh any mitigating circumstances. The sentence of death is warranted in this case.[538]

Based on the record and the deliberate, rational, logical deductive process reflected in the trial court's opinion, we conclude that the trial court did not impose the death sentence either arbitrarily or capriciously under 11 Del. C. § 4209(g)(2)a.

C. *Death Penalty Proportionality Review*

In conducting the statutorily-mandated proportionality inquiry, the Court "refers to the 'universe' of cases involving first degree murder charges that have included a penalty hearing and after the conclusion of which the sentence has become final."[539] Those cases appear as an appendix to this decision. An exact comparison of these cases is not practicable, "but a review of

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[538] 1999 Del. Super. LEXIS 541, *24-28.

[539] The relevant universe of cases may be found in Appendix A attached hereto. *Zebroski*, 715 A.2d at 84 (quoting *Lawrie v. State*, Del. Supr., 643 A.2d 1336, 1344 (1994)). Changes in the death penalty statute enacted in 1991 create dissimilarities between cases decided before and after that year but pre-1991 decisions are still relevant. *See Lawrie*, 643 A.2d at 1350.

some objective factors, including the gravity of the offense, the circumstances surrounding the crime, and the harshness of the penalty is helpful in reaching a determination of whether or not this case fits within a pattern of Delaware death sentence precedent."[540]

Capano argues that his death sentence is disproportionate. According to Capano, the universe of cases in which the death penalty has been imposed involves cases with "multiple victims" "and/or multiple statutory aggravating factors."[541] Capano argues that his case is "significantly less aggravated," and that "in single-victim cases, arising from a fractured personal relationship, death sentences are not routinely imposed."

Capano's argument is not persuasive. First, the fact that Fahey was Capano's only victim in this case does not meaningfully distinguish other cases meriting the death penalty. Nor does the fact that this killing involved a "fractured relationship." Like others sentenced to death in Delaware, Capano was found guilty of an unprovoked, cold-blooded murder of a defenseless person.[542] Moreover, we have stated that the "deliberate, cold-blooded killing, in execution style, of a helpless spouse or lover, is

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[540] *Zebroski*, 715 A.2d at 84 (citation omitted).

[541] In making this argument, Capano relies on the following cases: *Gattis v. State*, Del. Supr., 637 A.2d 808, 822 (1994) (two statutory aggravating factors); *Weeks v. State*, Del. Supr., 653 A.2d 266, 271-74 (1995) (multiple victims, three statutory aggravating factors); *Clark v. State*, Del. Supr., 672 A.2d 1004 (1996) (same).

[542] *See, e.g., Zebroski*, 715 A.2d at 84-85; *Ferguson*, 642 A.2d at 789; *Gattis*, 637 A.2d at 823; *Sullivan v. State*, Del. Supr., 636 A.2d 931, 950-51 (1994).

deserving of society's harshest condemnation."[543] The evidence in this case was that Capano spent months planning to kill Fahey, his one-time lover.

Capano relies on *Taylor v. State*,[544] and *Williamson v. State*,[545] cases involving brutal murders in which the defendant was not sentenced to death. In *Taylor*, the defendant stabbed his pregnant girlfriend after breaking into her apartment.[546] In *Williamson*, the defendant surprised and strangled his victim in front of a woman whom he had bound and raped.[547] In *Taylor* and *Williamson* the qualitative nature of the mitigation evidence was different from that involved in this case. Although Taylor and Williamson could have justified a sentence of death, their cases nevertheless are distinguishable on a fundamental level because there is no suggestion in those cases of substantial planning and premeditation as was found in this case. Cases imposing the death penalty have given weight to the existence of a plan to carry out the murder.[548]

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[543] *Weeks*, 653 A.2d at 274 (quoting *Gattis*, 637 A.2d at 823).

[544] Del. Supr., 685 A.2d 349 (1996).

[545] Del. Supr., 669 A.2d 95 (1995).

[546] *Taylor*, 685 A.2d at 349-50.

[547] *Williamson*, 669 A.2d at 96-97.

[548] *See, e.g., Weeks*, 653 A.2d at 274 ("Weeks plotted the death of his wife at least two days in advance. . . .); *Sullivan*, 636 A.2d at 949-50 (quoting trial court's statement that "a killing during the course of a robbery or burglary becomes egregiously heinous when it is preceded by a substantial period of planning, reflection, and calculation by the killer as occurred here").

Second, the fact that there is only one statutory aggravating factor in this case does not make imposition of the death penalty disproportionate. The number of statutory aggravating factors does not indicate fully the gravity of the offense and the totality of the circumstances surrounding the crime. As the trial court recognized, Capano's planned murder of Fahey was "horrific."

In *Zebroski*, we found that the death penalty was not disproportionate where only one statutory aggravating factor was found but in which there were a number of nonstatutory aggravating circumstances.[549] Similarly, in this case, there were substantial nonstatutory aggravating circumstances.[550] The trial court discussed several instances of reprehensible behavior by Capano.[551] During his incarceration before trial, Capano conspired with another inmate to have MacIntyre's house burglarized in order to intimidate her into not testifying truthfully.[552] Perhaps most egregiously, Capano kept his knowledge of Fahey's fate hidden from her family for over two years in order to escape detection.[553] Accordingly, we hold that

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[549] *Zebroski*, 715 A.2d at 83.

[550] *Cf. Steckel*, 711 A.2d at 14 (noting that the non-statutory aggravating factors were "substantial both in their number and their gravity").

[551] Mem. Op. at 10-11.

[552] *Cf. Jackson v. State*, Del. Supr., 684 A.2d 745, 754 (1996) (noting as a non-statutory aggravating factor that "while in prison Jackson had conspired to murder a State witness who would testify against him").

[553] *See Weeks*, 653 A.2d at 274 ("Immediately following the killing, Weeks showed no remorse. Instead, he sought to prevent detection of his involvement in the killing.").

the imposition by the Superior Court judge of a death sentence in this case was not disproportionate to sentences imposed on other defendants in the relevant universe of cases.[554]

XIX. Conclusion

For the reasons set forth herein, the judgment of the Superior Court is affirmed. The matter is remanded to the Superior Court for the purpose of setting a new execution date.

CONCURBY:
STEELE; CHANDLER

CONCUR:

STEELE, Justice, with whom CHANDLER, Chancellor, joins concurring:

I join in and agree with the majority's judgment to affirm. I believe that the majority opinion carefully and persuasively determines that the trial judge's immediate response to Gerry's comment about the impending lie detector test by striking the reference and by issuing a clear cautionary instruction to the jury cured any potential prejudice to Capano. Further, I agree that the majority opinion thoughtfully makes the case that when the trial judge admitted Lyons' testimony about the circumstances that induced Gerry's alleged further disclosure that any error by so doing was harmless. I, therefore, concur with the majority's ultimate conclusion that neither ruling

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[554] *See* Appendix A attached.

"warrant[s] a reversal of Capano's conviction and sentence."

I respectfully would hold, notwithstanding any concurrence in the result, and contrary to Part III B of the majority Opinion, that the trial judge properly admitted Lyons' testimony. In my view, therefore, the trial judge committed no error whatsoever.

I agree with the majority's conclusions that:

1. the trial judge's limiting instructions minimized the impact of Lyons' testimony about the timing of Gerry's full disclosure of the alleged facts and of Gerry's revelation that he believed that he would have to be more forthcoming before he "went and took the lie detector test" that, inferentially, might be required by the FBI; and,

2. given the totality of the evidence of planning, that portion of it supplied by Gerry as part of his fuller disclosure "was not an indispensable or critical part of the State's case."

However, two important considerations lead me to the conclusion that the trial judge correctly allowed Lyons' testimony explaining the circumstances surrounding Gerry's fuller disclosure.

First, trial judges regularly meet the needs of parties to explain (and juries to understand) salient facts in a case where there are legitimate risks of a misunderstanding of the relevance of that evidence, or where the danger exists that, though relevant, the evidence might create unfair prejudice. Evidence is often admitted for a limited purpose, with proper cautionary instructions, and legitimately so. Evidence has only one ultimate purpose –

"that the truth may be ascertained and proceedings justly determined."[555] When a trial judge "restricts the evidence to its proper scope and instruct[s] the jury accordingly,"[556] he or she does so with ascertainment of the truth uppermost in mind.

Second, regardless of the prosecutor's recasting of Lyons' testimony in his closing, Lyons never attempted to comment on the truthfulness of Gerry's disclosure before or after Gerry's decision to disclose more fully what he "knew" to federal agents. Lyons, th[r]ough his attorney, was in no position to support Gerry's credibility at either point in time. I have no reservation in concluding that the jury clearly understood that very point.

I fully endorse the majority's view, explained in Section II of the Opinion, on the Delaware Courts' approach to the admissibility or exclusion of evidence. Entirely consistent with that view, is my belief that it is better to let the jury know the actual, truthful explanation of why at that particular moment Gerry expanded his testimony, with appropriate caution, than to leave them to speculate on a wide range of irrelevant, untruthful possibilities for his apparent epiphany.

The Reference to a Polygraph Test

I agree that any reference to a polygraph test *may be* potentially mischievous and should, therefore, be brought to the trial judge's attention and carefully

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[555] D.R.E. 102.

[556] D.R.E. 105.

screened with enhanced scrutiny to assure that no other appropriate alternative evidence is available to establish the relevant operative fact sought to be admitted and that a restrictive instruction be crafted to instruct the jury on the limited purpose for which the evidence is being admitted.[557] I further agree that ***Whalen*** may not be read broadly to permit references to a lie detector test to prove a limitless range of operative facts. Nevertheless, a "*per se* exclusionary rule" would go too far when there may be no other basis for admitting critical evidence, the trial judge conducts an appropriate Rule 403 analysis and then formulates a clear cautionary instruction for the jury.

Here, I see little meaningful difference between admitting polygraph evidence to prove that under all of the circumstances a confession was voluntary (as in ***Whalen***) and admitting evidence that a witness believed he would have to submit to a polygraph – a belief which caused him to divulge more expansively his knowledge of facts relating to issues in this case. In light of the trial judge's cautionary instruction, I believe there is no basis to conclude that either (1) the jury would simply blatantly ignore the instruction and blindly find that Gerry both took the test and passed it, or (2) the jury proceeded, contrary to the instruction, to find through speculation about unreliable evidence that Gerry ultimately told the truth.

Lyons' Testimony and Attorney Vouching

While I agree that *if* it was error to admit the Lyons testimony that it was harmless error, and therefore concur

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[557] D.R.E. 105.

in the conclusion to affirm on this point, I respectfully depart from the majority's view that the references were dubious or problematic under the circumstances of this case and would rule that the references were properly admitted.

Lyons' actual testimony mentions only that he told Gerry that "yes," he would or might be required to take a polygraph test and that "you can't hold anything back." The purpose of this testimony was to explain the circumstances surrounding Gerry's fuller disclosure of what he, Gerry, believed to have occurred. At no time did Lyons attempt to characterize the testimony in any way to bolster Gerry's credibility. I recognize the points made by the majority in support of their view that there was "potential that Lyons' status as an experienced lawyer *may have* imparted credibility to Gerry's testimony. . . . " I note and accept as reasonable the majority's view that " . . . a jury *would be likely* to infer that Gerry did not disregard Lyons' emphatic directive to make full disclosure." (emphases added) I simply do not agree with those inferences in light of the cautionary instruction given to the jury and my own, I hope equally reasonable inference, that a jury does not, in our current culture, accept criminal defense attorneys as the paradigm for "truth, justice and the American way" (if there still be one). Explaining why Gerry offered additional detail at that point would assist the jury's understanding of relevant events. The trial judge immediately instructed the jury, appropriately limiting the inferences that they could fairly draw from the references to a prospective polygraph test or from Lyons' status as an attorney. Nothing in Lyons' actual testimony suggested that suddenly Gerry then started telling the

truth and that he may not have been until that denouement. The jury had to understand from the cautionary instruction that they still had to resolve whether Gerry told the truth before and after he concluded that he would more fully disclose what he knew. The jury knew that they remained free to conclude that this turncoat brother lied both before and after the fuller disclosure because the cautionary instruction told them as much. If error occurred, no matter how harmless, it occurred when the prosecutor, without objection, embellished the inference in his closing by asserting that Lyons said "you have to tell the complete truth," when in fact, Lyons made no such statement.[558]

I, therefore, would conclude that the trial judge did not abuse his discretion when he allowed Lyons to testify and when he permitted the State to elicit testimony that Gerry had disclosed additional information when confronted with the probability that he would face a polygraph test when the trial judge's instruction appropriately limited the jury's consideration of the circumstances under which it was admitted and the purpose for which it was admitted.

CHANDLER, Chancellor, with whom STEELE, Justice, joins concurring:

I join in and agree with the ultimate judgment to affirm in Chief Justice Veasey's Opinion for the Court. Nevertheless, I respectfully disagree with the analysis by the majority in two areas of the Opinion – Part III.B. and Part XV.

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[558] Tr. of 1/13/99, at 66-68.

For reasons I briefly set forth below (as well as those raised in Justice Steele's concurrence, with which I fully agree and in which I also join), I do not agree with the majority's determination that the trial court erred when it (1) admitted Lyons' testimony about the lie detector test, and (2) limited the scope of Capano's allocution.

1. Lyons' Lie Detector Testimony

As do most jurisdictions, Delaware has a long-standing, and quite proper, prohibition against admission of the results of lie detector tests. Such a prohibition is warranted because the results of a lie detector examination are inherently unreliable, and their apparent scientific nature has the potential to mislead jurors into giving the results undue weight. Admission of *results* of lie detector tests, therefore, may constitute reversible error.[559]

The testimony in this case concerning a potential lie detector test, however, is quite different. Here, there was no evidence presented to the jury that a lie detector test was ever administered to Gerry Capano, let alone what the results of such a test might have been. Rather, the testimony in this case indicated that Gerry *believed* that he was *subject* to a lie detector test. This was offered to explain to the jury why Gerry changed his statement to investigators in the case. As the trial judge properly instructed the jury, in his limiting instruction, this evidence was provided to them so that they could perform their most basic function: evaluation of the reliability of

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[559] *See Foraker v. State*, Del. Supr., 394 A.2d 208 (1978).

evidence from which they could draw conclusions of fact. Given the trial judge's adequate and explicit limiting instruction, and given the nature of the evidence presented, this is not a case in which the unduly persuasive value of the *results* of a pseudo-scientific lie detector test tainted the jury's deliberations. Because the majority appears to impose unnecessarily restrictive standards on the admission of relevant testimony that happens to include the words "lie detector," I cannot join in the majority's finding of error. I do join in the majority's ultimate conclusion that any error (had there been one) was harmless beyond a reasonable doubt.

Likewise, I respectfully disagree with the majority's conclusion that the trial court erred in admitting Lyons' testimony because it amounted to a "subtle and indirect version of vouching for Gerry's credibility."[560] Relying upon *Graves v. State*,[561] the majority views Lyons' admonitions to Gerry "to make full disclosure" and Gerry's possible exposure to a lie detector test, together with Lyons' status as an experienced lawyer and former federal prosecutor, as the subtle equivalent of Lyons' vouching for Gerry's truthfulness in his disclosures to federal prosecutors. I confess that the majority's rationale is too subtle for me to grasp.

First, Lyons never testified explicitly, or implicitly, that he thought Gerry was being truthful, either before or

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[560] *Supra*, 2001 Del. LEXIS 349, *54.

[561] 1994 Del. LEXIS 231, Del. Supr., No. 144, 1993, Walsh, J. (Aug. 1, 1994) (ORDER).

after Gerry changed his story with the prosecutors. Second, none of the "reputational boasting" that occurred in *Graves* occurred here. Third, I think the majority has confused two distinct concepts. It is unproblematic for a jury to be provided information that may assist them in assessing the credibility of a witness. That is what occurred here. Lyons explained how he urged Gerry to "not hold anything back." The jury was entitled to consider that fact in its effort to assess whether Gerry was, at trial, telling the whole truth and whether the story he told to federal agents was the whole truth. What the majority then finds troubling is that Lyons' testimony might have been persuasive, that is, that the jury could have found that his advice had actually caused Gerry to have spoken truthfully to federal agents. But that conclusion is also unproblematic. The jury quite properly could consider whether a witness's testimony had changed because that witness had been advised to not hold anything back. Similarly, the jury quite properly could consider testimony that a witness's story had changed because the witness had been warned that he faced perjury charges if he did not testify fully about what had happened. I find nothing problematic about a jury having the right to consider and assess whether information of this kind is helpful in determining whether a particular witness is credible or not.

The majority finds it "implicit in Lyons' testimony that Lyons *believed* his own admonitions to have been effective . . . [and] thus a subtle and indirect version of vouching for Gerry's credibility."[562] If I found such

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[562] *Supra*, 2001 Del. LEXIS 349, *54 (emphasis added).

vouching were "implicit" (or explicit) in Lyons' testimony, I also would be concerned. The danger then would be that the jury would evaluate Gerry's credibility not on the facts (including, permissibly, the fact of Lyons' admonitions) but rather based on Lyons' presumably expert opinion (that he, Lyons, believed Gerry had followed his advice), thus impermissibly abdicating the jury's role as fact finder. The problem, in my view, with the majority opinion is that I see no such implicit vouching. The majority conflates legitimate factual testimony ("I told Gerry to make full disclosure") with illegitimate opining ("I am sure he did make full disclosure"). Nothing in the record indicates that the latter belief or opinion was expressed to the jury, either implicitly or explicitly.

In my opinion, it is not necessarily problematic for a lawyer to testify as a fact witness in the manner that occurred here. In this day and age, I think it highly unlikely that jurors would accord greater weight to a lawyer's testimony than to anyone else's, and certainly nothing in this bizarre case, where a lawyer was on trial for murder, would lead a juror to think that lawyers are trusted professionals to whom deference is owed.[563] In any event, even if it was error to admit Lyons' testimony, I agree that it was harmless error.

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[563] *See, e.g.*, Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. Cin. L. Rev. 805 (1998).

2. *Capano's Allocution*

The majority has decided that the trial court committed error in restricting Capano's right of allocution. While I agree that any error in this context would have been harmless, I am forced to concur separately because I conclude that there was no error at trial.

As this Court recognized recently in *Shelton v. State*,[564] allocution, at present, serves two purposes for a convicted murderer: it permits him to ask for mercy and to attempt to impress a jury with his feelings of remorse.[565] The *Shelton* Court, purporting to rely on Superior Court Criminal Rule 32(a)(1)(c) and 11 Del.C. § 4209(c)(2), found that it was error for the trial court to limit a defendant, during an allocution not subject to cross-examination, from arguing that the jury had made factual errors leading erroneously to a finding of guilt. In my opinion, however, nothing in the Superior Court Rule or the death penalty statute mandates that a defendant be permitted to attack collaterally a jury verdict in this manner. To allow a defendant to recast disputed facts in a way favorable to him, after the jury has already reached its verdict, goes beyond the legitimate evocation of mercy and communication of remorse and also attempts to cause the jury to doubt its own verdict in a way that is not subject to cross-examination or other effective correction by the prosecution. In short, such a proceeding is likely to produce confusion and other mischief. To the extent the majority concludes that *Shelton* requires that

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[564] Del. Supr., 744 A.2d 465 (2000).

[565] *See Shelton*, 744 A.2d at 492.

Capano should have been allowed to present again a factual theory which the jury had rejected, as evidenced by its conviction, it is my opinion that *Shellton* itself is in error and should be overruled. Therefore, on the allocution issue, I respectfully concur in the result, but I do not join in that aspect of the Opinion finding that the trial court's limitations on allocution constituted error.

Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

THOMAS J. CAPANO,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Delaware

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME II

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APPENDIX B

STATE OF DELAWARE v. THOMAS J. CAPANO, DEF. ID # 9711006198

CRIMINAL ACTION NO. IN97-11-0720

SUPERIOR COURT OF DELAWARE, NEW CASTLE

1999 Del. Super. LEXIS 541

March 16, 1999, Decided

DISPOSITION:

Court concludes sentence for defendant's commission of murder of Anne Marie Fahey shall be death by lethal injection.

COUNSEL:

Ferris W. Wharton, Esquire, Department of Justice, Wilmington, Delaware and Colm F. Connolly, Esquire, U.S. Attorney's Office, Wilmington, Delaware, Attorneys for the State.

Eugene J. Maurer, Jr., Esquire, Eugene J. Maurer, Jr., P.A., Wilmington, Delaware; Charles M. Oberly III, Esquire, Oberly, Jennings & Drexler, P.A., Wilmington, Delaware; Joseph S. Oteri, Esquire, Boston, Massachusetts; and John F. O'Donnell, Esquire, Fort Lauderdale, Florida, Attorneys for the Defendant.

JUDGES:
William Swain Lee, Judge.

OPINION BY:
William Swain Lee

OPINION:

MEMORANDUM OPINION

LEE, J.

On January 17, 1999, defendant Thomas J. Capano ("defendant") was convicted of murder in the first degree for the death of Anne Marie Fahey. On January 28, 1999, after completion of a penalty phase hearing, eleven (11) of the jurors found a statutory aggravating circumstance existed, while one (1) found it did not. The jury, in finding the aggravating circumstances outweigh mitigating ones, also recommended that the death penalty be imposed by a vote of ten (10) to two (2). This Court considers the jury's recommendation; however, it must make the ultimate determination of whether to impose a sentence of death or of life in prison without probation, parole or any other reduction. This is that decision.

I. BACKGROUND

Defendant is an attorney who was admitted to the Delaware Bar in 1975.[1] He was married for twenty-six (26) years, and this marriage produced four daughters. He has performed public service over the years, working as a Deputy Attorney General, as City Solicitor during the administration of Mayor Daniel Frawley, and as legal counsel to Governor Michael Castle. At the time of the crime, he was managing partner at the Wilmington office of the law firm of Saul, Ewing, Remick & Saul, L.L.P. He has performed charity work and been a source of strength for his mother and his siblings, which include three brothers and a sister. By all accounts, defendant appeared

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[1] Defendant's license to practice law has been suspended pending the outcome of these proceedings.

to be an upstanding member of Delaware's community. However, there was another life defendant led which was hidden from virtually everyone. That life included affairs with numerous mistresses. One of the affairs was with Anne Marie Fahey ("Fahey").

Fahey last was seen alive on June 27, 1996. That evening she had dinner in Philadelphia, Pennsylvania with defendant. Fahey's family reported her missing on June 30, 1996.

Fahey was the scheduling secretary to Delaware's Governor, Thomas Carper. The President of the United States knew of Fahey through dealings with Governor Carper, and when he learned about her disappearance, he offered, in early July, the help of the federal government. The Federal Bureau of Investigation ("FBI") joined an investigation into Fahey's disappearance on or about July 8, 1996. The United States Attorney's Office joined the investigation no later than July 25, 1996. In July, 1996, the United States Attorney's Office for the District of Delaware, the FBI, and the Wilmington Police Department began a federal Grand Jury kidnapping investigation into the disappearance of Fahey.

Until he testified at his trial, defendant maintained that he had not seen Fahey since he dropped her off at her apartment on the evening of June 27, 1996. Even though he knew that Fahey was dead and that he had disposed of her body in the Atlantic Ocean, defendant suggested over the next two years other theories for her disappearance: she might be at the Jersey Shore, she might have gone off to another country, she was suicidal,

someone else might have killed her. Despite his knowledge that many were looking for her, even keeping a vigil at her apartment, he never bothered to tell anyone that she was dead.

Breaks in the case came from defendant's brothers. Defendant's brother Gerard Capano ("Gerard") told investigators that he had helped defendant dispose of a body in the Atlantic Ocean on June 28, 1996. The body had been in a cooler, and, when the cooler would not sink, the body and the cooler were separately thrown into the ocean. Fishermen found a cooler, and it was shown that defendant purchased an identical cooler on April 20, 1996. Additionally, Defendant's brother Louis Capano ("Louis") told investigators that at the end of June, 1996, he instructed employees to dispose of items in a dumpster owned by his company. Defendant had told Louis he had thrown into the dumpster personal items of Fahey as well as a sofa which had Fahey's blood on it.[2]

The information gathered during the federal investigation was turned over to the State of Delaware ("the State"). On November 12, 1997, defendant was arrested on the charge of Murder in the First Degree in the death of Fahey. A Delaware Grand Jury indicted defendant on that charge on December 22, 1997. Defendant has been incarcerated since his arrest.

Defendant's proof positive hearing pursuant to 11 Del. C. § 2103(b) took place from February 2 through

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[2] Defendant told Louis that Fahey had slit her wrists on the evening of June 27, 1996 and had bled on the sofa; that he had thereafter taken Fahey home, never to see her again.

February 6, 1998. Defendant hoped to obtain bail, and in connection with that hearing, defendant attempted to manipulate another of his lovers to testify on his behalf. This lover was Deborah MacIntyre ("MacIntyre"). MacIntyre and defendant, who had been lovers since May, 1981, continued to have contact during defendant's incarceration through letters and telephone calls. Meanwhile, MacIntyre was having problems with the government in connection with her story concerning her purchase and disposal of a gun before the murder of Fahey. Ultimately, MacIntyre did not testify on behalf of defendant. Instead, she hired a new attorney and entered into an agreement with the government that required her to testify truthfully concerning the gun in exchange for not being prosecuted for her prior lies concerning it.

The story concerning the gun which defendant did not want told is as follows. In April, 1996, defendant told MacIntyre he wanted her to buy a gun for him because someone was trying to extort him. On May 13, 1996, defendant met MacIntyre at a gun store. MacIntyre went in and purchased the gun at defendant's request. MacIntyre then gave the gun to defendant. She never saw the gun after she gave it to him, and during the investigation into Fahey's disappearance, defendant asked her to lie about the gun. He also told her the gun was gone "deep in the water."

Armed with the evidence noted above as well as other evidence, the State proceeded to prosecute defendant.

II. THE CRIME

The guilt phase of the trial in this matter began on October 26, 1998. At that trial, along with much of the evidence noted above, the following evidence was established pertaining to the murder of Fahey and the disposal of her body thereafter.

Fahey had been trying to end the relationship with defendant. She had begun a new relationship, and this relationship had potential to be meaningful and long-term. About the time Fahey was working on her new relationship, defendant had separated from his wife. When Fahey began pulling away from defendant, defendant became extremely angry at Fahey and he expressed his rage at her during several violent episodes. Defendant continued to pursue Fahey. It appears that near the time of her death, Fahey hoped that they had established a friendship and she attempted to deal with defendant on that basis.

Around February, 1996, defendant concocted a story which he told Gerard and another brother, Joseph Capano ("Joseph"). The story was that an extortionist or extortionists was/were threatening him.[3] He asked Gerard for help should he have to kill the extortionist(s). Specifically, he asked to borrow Gerard's boat to dispose of the body(ies).

On April 20, 1996, defendant purchased a cooler identical to the one in which Fahey's body was disposed.

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[3] The number of extortionists changed and the reason for the threat never was clarified.

On May 13, 1996, defendant had MacIntyre purchase a gun for him.

On June 27, 1996, defendant took Fahey to dinner in Philadelphia. After dinner, they returned to his home. He killed her that evening in his home.

Defendant testified that he did not kill her, but instead, MacIntyre killed her. According to him, MacIntyre came to his house. She had a gun with her. When MacIntyre saw Fahey with defendant, she threatened to shoot herself. As MacIntyre went to shoot herself, defendant grabbed MacIntyre's arm; MacIntyre shot Fahey directly behind the right ear, killing her instantly. After a few moments of panic, he pulled himself together, sent MacIntyre home, and cleaned up. He put Fahey's body in the cooler, which according to him, he had bought as a present for Gerard.

The jury found defendant's testimony to be incredible.[4] The jury obviously believed MacIntyre's testimony that she was not present at defendant's house that night and did not kill Fahey.

Defendant is the only person who knows exactly how he killed Fahey.

The next day, defendant and Gerard took Fahey's body to Gerard's boat, which was docked at the New Jersey shore. The two of them put the cooler on the boat

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[4] In March, 1998, defendant sent a letter to another ex-lover, Susan Louth, wherein he asked her to tell people that MacIntyre had killed Fahey and he indicated his hope that this story would influence the jury pool.

and took it approximately sixty miles out to sea. Defendant then threw the cooler overboard. It would not sink. Gerard took a shotgun used for killing sharks and shot the cooler in an attempt to make it sink. It still would not sink. Defendant pulled the body from the cooler and wrapped it with the chain and anchor, finally causing it to sink. Gerard saw a human foot as the body sunk below surface.[5] Gerard subsequently threw the cooler overboard.[6]

III. PENALTY PHASE

The testimony presented at the penalty phase is summarized below.

IV. THE PARTIES' CONTENTIONS

The State contended that one statutory aggravating circumstance existed: that the murder was premeditated and was the result of substantial planning. 11 Del. C. § 4209(e)(1)u.[7]

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[5] Gerard testified he did not see anything else because he purposefully would not look.

[6] As noted earlier, fishermen later found a cooler, which verified Gerard's story.

[7] In 11 Del. C. § 4209(e)(1)u., it is provided in pertinent part:

> Aggravating circumstances. – (1) In order for a sentence of death to be imposed, the judge must find that the evidence established beyond a reasonable doubt the existence of at least 1 of the following aggravating circumstances. . . . :

The State also contended that the following non-statutory aggravating circumstances existed:

1) Evidence of the impact of the murder upon friends, family and co-workers of Fahey;

2) Evidence of past actions of defendant seeking to harm an ex-lover;

3) Evidence of defendant's vindictiveness;

4) Evidence of defendant's criminal conspiracies during the investigation and while in prison;

5) Evidence of defendant's continuing manipulative behavior;

6) Evidence of defendant's lack of remorse;

7) Evidence of defendant's disdain for authority.

8) Evidence that the defendant remains a threat to direct crimes of vengeance while incarcerated.

Defendant disputed the existence of any elements which would establish the statutory aggravating circumstance of a premeditated murder which was substantially planned.

Defendant contended that the following mitigating circumstances existed in his case:

***u. The murder was premeditated and the result of substantial planning. Such planning must be as to the commission of the murder itself and not simply as to the commission or attempted commission of any underlying felony.

1) The lack of any prior criminal record;

2) The need for his daughters to have him in their lives;

3) The need for his mother to have him in her life;

4) The need of other family members to have him in their lives;

5) The intense guilt which Louis and, particularly, Gerard would feel for their part in participating in these proceedings which might result in defendant's death;

6) Defendant's community service;

7) Defendant's ability to help others in prison.

V. THE STATE'S EVIDENCE

The State contended that defendant substantially planned the murder, and it argued this was evidenced by a number of his actions. In late winter, early spring, 1996, defendant made inquiries to Gerard to use his boat in order to dump the body.[8] These arrangements were made by cover of the extortionist story which defendant told in February, 1996. In April, 1996, defendant purchased a cooler identical to that which became Fahey's coffin. Finally, in May, 1996, defendant had MacIntyre purchase a gun for him.

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[8] Interestingly, while working as a deputy attorney general, defendant prosecuted a case where the victim was shot behind the ear and the defendant in that case disposed of the murder victim's body by throwing it into the water.

The rest of the State's evidence dealt with non-statutory aggravating circumstances.

Fahey's family testified to the impact of the murder on their lives. They testified to what a positive influence Fahey had on their lives. She was a best friend to her sister, an integral part of the close-knit Fahey family which consisted of her siblings, their spouses and their children. She was an attentive aunt to her nephews. She was troubled, but there was a joie de vivre about her that infected others around her. She was loved by her family and by many friends and will be forever missed.

Family and friends still have a difficult time dealing with her death. For over two years, they did not know for certain what happened to Fahey or her body. They learned during the trial that she had been killed and her body tossed into the ocean. Family members continue to have a most difficult time dealing with her body's disposal and the fact that they never will have the opportunity to properly bury her.

The evidence showed defendant is manipulative, controlling, vindictive. His need for control over those around him is overwhelming. If someone breaks away from him or disobeys him, he lashes out with anger and violence. Not only does he take action on his own, but he conspires with others to help him in his schemes to punish that person for their disloyalty. For example, in the early 1980's, defendant conspired to have an ex-lover injured because she had rejected him. Ultimately, this ex-lover had to leave town in order to avoid the harassment he either was committing or was having committed against her. Because she rejected him, defendant ran her

out of town and conspired to have her harmed. When defendant learned that MacIntyre refused to continue lying about the gun, he conspired with another inmate to have her house burglarized. His purpose was to intimidate her into continuing to lie for him and to not testify truthfully regarding the gun. He did not want his brothers Louis and Gerard to testify on his behalf in the penalty phase because he would rather they have suffered guilt than speak to save his life. He pressured his mother and sister to ostracize Gerard and Louis for their disloyalty to him. He killed Fahey when she sought to terminate their relationship and he involved MacIntyre, Gerard and Louis in this murder.

The State presented evidence showing that defendant has no regard for rules. He has violated the prison rules numerous times. He conspires with other inmates to beat the prison system. He has done nothing constructive while in prison.

It also is noteworthy that defendant breached many rules the Court imposed during these proceedings. The Court, directly, and through counsel, on numerous occasions set forth rules to defendant which it expected him to follow, and defendant consistently violated those rules. He openly defies authority.

Finally, defendant has shown no remorse. He has not shown remorse for the death of a woman he claimed to love or for the impact of his actions on his long-term mistress, his family, the Faheys or friends whose lives have been forever damaged by his actions. Defendant's brother-in-law stated that defendant's medications have precluded him from showing any emotions. However,

throughout this trial, defendant has shown a plethora of emotions: anger, defiance, contempt, and concern for some members of his family. He just has not shown the appropriate emotions: remorse, sadness, guilt, horror at his actions.

VI. DEFENDANT'S EVIDENCE

Defendant's position regarding the substantial planning requirement is that none of the elements required to establish substantial planning existed. First, defendant maintained that he purchased the cooler as a present for Gerard, not for use as a coffin. Second, he testified that he never told Gerard or Joseph any stories about extortionists. Finally, he testified that he never went with MacIntyre to purchase a gun and he never saw her with a gun until she appeared at his house on the evening of Fahey's death.

Defendant produced the following evidence regarding mitigating circumstances.

First and foremost, he is the father of four wonderful daughters who need him. These girls have regular contact with their father, they love him very much, they support him, and they want him in their lives forever.

Second, other members of the family want defendant to continue to be a part of their lives. Defendant has been a strong presence in his family over the years, providing his mother, his siblings and their children emotional support, advice, guidance. They need him and want him to continue being a part of their lives.

Third, defendant led a good life and performed much public service. Defendant worked as a Deputy Attorney General, as City Solicitor during the administration of Mayor Daniel Frawley, and as legal counsel to Governor Michael Castle. He was active in his parish and he performed much work for the Catholic Church. He was on the Board of Directors and active in the affairs of several parochial schools. He participated in his daughters' lives and activities. He performed charity work. By all accounts, defendant appeared to be an upstanding member of Delaware's community. However, that good, even model, life is tainted by the private life he led, the life that was private even from his family.

The fourth mitigating circumstance is the impact of a death sentence on Louis and Gerard. Of most concern to this Court is the likelihood that a death sentence would debilitate Gerard. Gerard feels tremendous guilt for having "betrayed" the defendant by telling the truth. He would feel great responsibility and remorse for any death sentence imposed.

The fifth mitigating circumstance is that defendant could help others in prison such as by teaching them to read or providing legal advice if he is allowed to live, a possibility he, himself, did not choose to explore in his allocution.

VII. THE COURT'S SENTENCING DETERMINATIONS

A. THE PROCEDURE

The procedure which is to be followed in the penalty phase of a first degree murder case is set forth in 11 Del. C. § 4209. Where there is trial by jury, the jury hears evidence pertaining to aggravation and mitigation and it hears argument from counsel for both sides. Then, the Court gives instructions and directs the jury to decide whether the evidence shows beyond a reasonable doubt that a least one statutory aggravating circumstance exists and whether the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. 11 Del. C. § 4209(d).

In connection with its sentencing recommendation, the jury in this case had to respond to two questions. The first question was whether the evidence showed beyond a reasonable doubt the existence of the statutory aggravating circumstance, i.e., that the murder was premeditated and the result of substantial planning. The second question was whether the jury found by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found to exist outweighed the mitigating circumstances found to exist. The jury found by a vote of eleven (11) to one (1) the existence of the enumerated statutory aggravating circumstance. The jury found by a vote of ten (10) to two

(2) that the aggravating circumstances outweighed the mitigating circumstances.

After the jury has made its determination and recommendation, this Court must decide the same questions. *Wright v. State,* Del. Supr., 633 A.2d 329, 335 (1993), *cert. den.,* 517 U.S. 1249, 116 S. Ct. 2509, 135 L. Ed. 2d 198 (1996). The Court may reject the jury's recommendation. *Lawrie v. State,* Del. Supr., 643 A.2d 1336, 1346 (1994), *cert. den.,* 513 U.S. 1048, 115 S. Ct. 646, 130 L. Ed. 2d 551 (1994). However, the Court does not ignore the jury's findings; instead, it considers the jury's recommendation when deciding what sentence to impose. 11 Del. C. § 4209(d). But, in any case, the Court renders the final decision on the sentencing. *Shelton v. State,* Del. Supr., 652 A.2d 1, 5 (1995). If the Court does not find a statutory aggravating circumstance exists beyond a reasonable doubt, then a life sentence must be imposed. 11 Del. C. § 4209(d). If it does find the existence of a statutory aggravating circumstance beyond a reasonable doubt, then it undertakes the weighing process set forth in 11 Del. C. § 4209(d) (1)b.

I follow the statutory procedure below.

B. STATUTORY AGGRAVATING CIRCUMSTANCE

I conclude that the State has proven beyond a reasonable doubt the existence of the following statutory aggravating circumstance: the murder was premeditated and the result of substantial planning. 11 Del. C. § 4209(e) (1)u. Within the same time frame, defendant had MacIntyre buy a gun; he purchased the cooler; he made plans to

borrow Gerard's boat; by creating the story of the possible need to kill extortionist(s), he laid the groundwork for a cover story which would allow his brother to help him dispose of a body; and he lulled Fahey into a false sense of security by pretending that he would settle for being her friend. Defendant took these steps during and after Fahey rejected him as her lover. Defendant had a plan and he worked on that plan for months before he ultimately murdered Fahey when it became clear to him that she had rejected him as her lover.

The defense has argued that if defendant had a plan, he would not have been so sloppy. His plan was not sloppy. Instead, a number of circumstances occurred which defendant obviously did not anticipate, and these circumstances helped to expose defendant as the murderer. These circumstances were the recovery of the cooler by the fishermen which verified Gerard's story; the recovery of a blood donation by Fahey which led to the ability to compare that blood to blood spots found in defendant's house; and the intervention of the federal government into the investigation which gave the investigating authorities access to a wider range of resources than the State or the City of Wilmington might otherwise have had. The involvement of Federal and State agencies outraged the defendant who suffered from the delusion that he and his friends were so powerful within the City of Wilmington that murder could be "worked out" with the Wilmington Police Department.[9]

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[9] Defendant indicated in his trial testimony that he thinks there are some rules of fair play which would have precluded the federal government's participation in the criminal

The Court is satisfied that the State proved beyond a reasonable doubt that defendant premeditated the murder of Anne Marie Fahey and he substantially planned that murder.

C. NON-STATUTORY AGGRAVATING CIRCUMSTANCES

The Court is satisfied that the State has proved by substantial and reliable evidence the existence of the following non-statutory aggravating circumstances:

1) Substantial impact of the murder upon friends, family and co-workers of Fahey;

2) Past actions of defendant seeking to harm an ex-lover;

3) Defendant's vindictiveness;

4) Defendant's criminal conspiracies;

5) Defendant's continuing manipulative behavior;

6) Defendant's lack of remorse;

7) Defendant's disdain for authority.

8) Defendant remains a threat to direct crimes of vengeance while incarcerated.

This murder has had and will continue to have a long-lasting, profound impact on the Fahey family, on Fahey's friends and on her co-workers. They have been deprived, respectively, of a beloved sister, aunt, and

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investigation, thereby resulting in his ability to escape conviction and punishment for murdering Anne Marie Fahey.

friend. Defendant brought pain and heartache on many innocent people, and destroyed the lives of many.

Defendant is manipulative, vindictive, and disdainful of authority. It is unlikely that he will adjust well to prison life and he probably will continue to defy prison authorities. It is likely that he will continue to involve other inmates in conspiracies to break prison rules or to mete out punishments to those he considers deserving of such.

Defendant is not remorseful for his actions resulting in the death of Fahey or in the disposal of her body. He only is angry that the Government was able to catch him, and that MacIntyre, Gerard and Louis were disloyal when required to tell the truth.

D. MITIGATING CIRCUMSTANCES

I find the following mitigating circumstances exist in this case:

1) Defendant's lack of any prior criminal record;

2) The need for his daughters to have him in their lives;

3) The need for his mother to have him in her life;

4) The need of other family members to have him in their lives;

5) The intense guilt which Louis and, particularly, Gerard would feel for their part in

participating in these proceedings which might result in defendant's death;

6) Defendant's community service.

I do not find that defendant is likely to help others while in prison. He has not yet undertaken to help others in a positive manner and it is likely that if he befriends anyone, it will be with the purpose of having that person do something for him.

VIII. GUIDELINES TO FOLLOW IN WEIGHING AGGRAVATING AND MITIGATING CIRCUMSTANCES

The Court does not merely weigh the number of aggravating circumstances against the number of mitigating circumstances.

The procedure to be followed by the trial judges . . . is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

Delaware v. Cohen, Del. Supr., 604 A.2d 846, 849 (1992) (citing *State v. Dixon*, Fla. Supr., 283 So. 2d 1, 10 (1973)). In determining the appropriate punishment, the Court weighs qualitatively rather than quantitatively. *State v. Manley & Stevenson*, 1997 Del. Super. LEXIS 5, *49, Del. Super., ID Nos. 9511007022, 9511006992, Barron, J. (January 10, 1997), *aff'd., Stevenson v. State*, Del. Supr., 709

A.2d 619 (1998); *Manley v. State*, Del. Supr., 709 A.2d 643 (1998).

IX. THE WEIGHING PROCESS

Defendant planned, over a period of time, to kill Anne Marie Fahey and to dispose of her body so that it could not be found. He then blamed the murder on an ex-lover who had testified against him. The crime defendant committed was horrific. The crime epitomized the makeup of his character: vindictive and controlling.

As was the case in *State v. Gattis*, 1992 Del. Super. LEXIS 474, Del. Supr., Cr. A. Nos. IN90-05-1017 – 1019; IN90-05-1106 & 1107, Barron, J. (October 29, 1992), *aff'd*, Del. Supr., 637 A.2d 808 (1994), *cert. den.*, 513 U.S. 843, 115 S. Ct. 132, 130 L. Ed. 2d 75 (1994), some may argue that a defendant should not receive the death penalty for a domestic homicide. It is appropriate to quote from Judge Barron in response to such a contention.

There are those who would consider less heinous and, therefore, more amendable to sentencing leniency, a murder committed against a spouse, paramour or girl-friend (i.e., a domestic homicide), as compared with a murder for pecuniary gain or a murder committed during the commission of a robbery or rape of a stranger. Conceptually, such a distinction is arguably supportable. Firstly, there is likely to be no statutory aggravating circumstance with regard to the former as opposed to the latter. See: 11 Del. C., § 4209(e)(1)j. and (e)(1)o.; 11 Del. C., § 4209(e) (2). Secondly, it is common with regard to domestic homicides that the perpetrator was under the

influence of extreme emotional distress or that his capacity to appreciate the criminality of his conduct or conform his conduct to the law was substantially impaired, while the latter class of homicides are normally perceived to be more callous and cold-blooded. Thirdly, the victim of a domestic homicide is often looked upon with less sympathy than a victim of, for example, a robbery-murder for the reason that the domestic homicide victim could have changed her living arrangement but opted not to do so, a rather twisted concept akin to consent.

As stated, this case is not a typical domestic homicide case. Here, two statutory aggravating circumstances were proven beyond a reasonable doubt. Moreover, the murder was committed in a callous manner without moral or legal justification. It was planned beforehand with adequate time for the defendant to contemplate the consequences of carrying out his intent. Further, the victim, tired of her relationship with the defendant, had endeavored to start a new life on her own.

Footnotes omitted.

State v. Gattis, 1992 Del. Super. LEXIS 474, * 43-46.

The circumstances of the murder here are similar to those in *Gattis*. No one, except the defendant, ever will know exactly how or why Anne Marie Fahey died. What is certain is that it was not a crime of passion but, rather, a crime of control. By all accounts, she had ceased to be defendant's lover but had never escaped his sphere of influence, control and manipulation. Defendant's premeditation and planning was for a contingency that, perhaps, he hoped would never happen, but did, on the

evening of June 27, 1996. He chose to destroy a possession rather than lose it; to execute an escaping chattel.

The only mitigating circumstances of significance to this Court concern defendant's daughters and the impact of the crime on Gerard. Defendant's daughters' love for their father is deep and genuine and they want him in their lives. However, during this trial, defendant has shown that he will take advantage of his daughters to accomplish an end which benefits himself. Their love for him is great. However, since defendant's past history is a prime indicator of his future behavior, it is clear that defendant poses a threat of harm to his daughter's well-being.

Gerard does not want defendant sentenced to death; he will feel great responsibility for it. Gerard bears no blame; instead, the blame goes directly to defendant. Defendant involved Gerard in his murder plans. Defendant committed the murder. Defendant is the one who must accept all blame, but does not because of his flawed character. Gerard should understand that defendant is reacting in his normal way: to strike out at the disloyal subject and punish that person who attempts to do what is right and not immoral.

Absent the harm to his daughters and to Gerard, there is nothing in defendant's life which would call for the imposition of a life sentence. Defendant will not adjust well in prison; he will constantly scheme to bypass prison rules; he will defy prison authority; he will continue to manipulate those who love him from within the prison walls. He poses a threat of harm even while incarcerated. He committed a horrific crime. That crime

and his antisocial behavior outweigh any mitigating circumstances. The sentence of death is warranted in this case.

X. CONCLUSION

The Court concludes that the sentence for defendant's commission of the murder of Anne Marie Fahey shall be death by lethal injection.

IT IS SO ORDERED.

Sentencing Order is to follow.

William Swain Lee

Judge

APPENDIX C

STATE OF DELAWARE v. THOMAS J. CAPANO

CRIMINAL ACTION NO. N97-11-0720

SUPERIOR COURT OF DELAWARE, NEW CASTLE

1999 Del. Super. LEXIS 324

July 25, 1999, Date Submitted

September 1, 1999, Date Decided

SUBSEQUENT HISTORY:

Released for Publication by the Court September 23, 1999.

DISPOSITION:

Motion for New Trial and/or Death Penalty Hearing Or In Alternative Judgment of Acquittal as to Death Sentence Denied. Motion to Interview State Witness Denied.

COUNSEL:

Ferris A. Wharton, Esquire, Department of Justice, Wilmington, Delaware, Attorney for the State.

Charles M. Oberly III, Esquire, Oberly & Jennings, P.A., Wilmington, Delaware, Attorneys for the Defendant.

JUDGES:

LEE, J.

OPINION BY:

LEE

OPINION:

MEMORANDUM OPINION

Motion for a New Trial and/or Death Penalty Hearing Or In the Alternative Judgment of Acquittal as to the Death Sentence

Motion to Interview a State Witness

LEE, J.

Pending before the Court is the motion of defendant Thomas J. Capano ("defendant") for a New Trial and/or Death Penalty Hearing or in the Alternative Judgment of Acquittal as to the Death Sentence ("the pending motion").[1] In his original motion, defendant advanced three grounds to support the pending motion. Subsequent thereto, defendant has asserted other grounds for a new trial and, in addition, has requested that he be allowed to interview Deborah MacIntyre, a witness for the State of Delaware ("the State"). I have denied some of those grounds on the record. However, there are two matters which I have not addressed on the record, and they will be addressed herein along with the original three grounds.

This constitutes my decision on the pending motion and on the request to interview Ms. MacIntyre.

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[1] An appeal has been taken to the Delaware Supreme Court. The Supreme Court has remanded the matter in order for this Court to deal with the pending motion.

FACTS

On January 17, 1999, defendant was convicted of murder in the first degree for the death of Anne Marie Fahey ("Fahey"). On January 28, 1999, after completion of a penalty phase hearing, eleven (11) of the jurors found a statutory aggravating circumstance existed, while one (1) found it did not. The jury, in finding the aggravating circumstances outweigh mitigating ones, also recommended that the death penalty be imposed by a vote of ten (10) to two (2). This Court considered the jury's recommendation; however, it made the ultimate determination of whether to impose a sentence of death or of life in prison without probation, parole or any other reduction. In its decision of March 16, 1999, the Court found that the State proved beyond a reasonable doubt that defendant premeditated the murder of Anne Marie Fahey and he substantially planned that murder. It further found and concluded that the State proved by substantial and reliable evidence the existence of the following non-statutory aggravating circumstances:

1) Substantial impact of the murder upon friends, family and co-workers of Fahey;

2) Past actions of defendant seeking to harm an ex-lover;

3) Defendant's vindictiveness;

4) Defendant's criminal conspiracies;

5) Defendant's continuing manipulative behavior;

6) Defendant's lack of remorse;

7) Defendant's disdain for authority.

8) Defendant remains a threat to direct crimes of vengeance while incarcerated.

The Court found the following mitigating circumstances existed in this case:

1) Defendant's lack of any prior criminal record;

2) The need for his daughters to have him in their lives;

3) The need for his mother to have him in her life;

4) The need of other family members to have him in their lives;

5) The intense guilt which his brothers Louis and, particularly, Gerard, would feel for their part in participating in these proceedings which might result in defendant's death;

6) Defendant's community service.

Finally, the Court found the aggravating circumstances outweighed the mitigating circumstances and accordingly, on March 16, 1999, imposed the death penalty.

On April 5, 1999, defendant filed the pending motion.[2] Defendant sets forth three grounds in support of that motion: failure of the jury to unanimously find an aggravating circumstance beyond a reasonable doubt; irreconcilable conflict in testimony; and record of juror dismissals. Since filing the pending motion, defendant

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[2] The Court expanded the period within which such a motion could be filed from seven (7) to twenty (20) days. Super. Ct. Crim. R. 33.

has asserted another ground for a new trial pertaining to a dismissed juror and he has requested he be able to interview Ms. MacIntyre.

DISCUSSION

Lack of Unanimity

The first ground defendant advances in support of the pending motion is that the jury did not return a unanimous verdict that there existed a statutory aggravating circumstance. He argues as follows in the motion:

> The standard of beyond a reasonable doubt as used in the context of a jury trial in Delaware has always required a unanimous verdict. In *Fountain v. State,* Del. Supr., 275 A.2d 251, the Court ruled that "it is of course fundamental under our law that the verdict of a jury must be unanimous." The basis for the Court's holding was the language of Article I, Sec. 4 of the Delaware Constitution of 1997 [sic], which provides: "The right to trial by jury shall be as heretofore." At the time the Delaware Constitution was adopted, the death penalty could only result form [sic] a unanimous verdict, which was the result of a guilt determination reached beyond a reasonable doubt. Thus, a death sentence at the time of the enactment of the Delaware Constitution could only result from a unanimous verdict, as that was the law in 1897 and before. *Cahill v. State,* Del. Super., 411 A.2d 317 (1980), rev'd on other grounds, Del. Supr., 443 A.2d 497 (1982). The passage into law of 11 Del. C. Sec. 4209 with the then existing aggravating circumstances and those added during the years following could not lawfully amend the

Delaware Constitution so as to dilute the unanimity requirement for finding a death sentence.

Of course, this argument is invalid as a reading of several Delaware Supreme and Superior Court decisions evidences. *Shelton v. State,* Del. Supr., 652 A.2d 1, 5-6 (1995); *Lawrie v. State,* Del. Supr., 643 A.2d 1336, 1346 (1994), *cert. den.*, 513 U.S. 1048, 115 S. Ct. 646, 130 L. Ed. 2d 551 (1994); *State v. Cohen,* Del. Supr., 604 A.2d 846, 851-52 (1992); *Gattis v. State,* Del. Super., 1995 Del. Super. LEXIS 608, Cr. A. Nos. IN90-05-1017 et al., Barron, J. (December 28, 1995) at 45-8, aff'd, Del. Supr., 697 A.2d 1174 (1997).[3] Consequently, in light of the above-cited decisions, defendant, in his letter memoranda dated July 16, 1999, in support of this pending motion, seeks to distinguish the decision of *State v. Cohen, supra.*

Defendant argues as follows.

In determining whether a statutory aggravating circumstance exists, the jury must make a finding based upon the evidence. "Nothing in the new law suggests that in requiring a finding beyond a reasonable doubt the legislature was abandoning the unanimity requirement necessary for all factual determinations." Defendant's Letter Memorandum dated July 16, 1999 at 6. The determination of whether there is a statutory aggravating circumstance is not a sentencing function; instead, it is a

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[3] The Superior Court initially issued its decision in the matter on August 24, 1995. *Gattis v. State,* Del. Super., Cr. A. Nos. In 90-05-1017, et. al. Barron, J. (August 24, 1995). It reissued the decision on December 28, 1995. The reissued decision is identical to the first plus it includes the Court's decision on the defendant's motion to reargue.

necessary statutory prerequisite to reaching the weighing function, and it is a factual determination. The jury must be unanimous in making this factual determination. Since a unanimous finding had to be reached here and it was not, the death penalty cannot stand and is in violation of Delaware's Constitutional guarantee of a trial of all facts by a jury.

Defendant's argument disregards the statute itself and precedent addressing the issue at hand.

In 11 Del. C. § 4209(c), the procedure to follow after the death penalty hearing is outlined as follows:

> (c)(3)a. Upon the conclusion of the evidence and arguments the judge shall give the jury the appropriate instructions and the jury shall retire to deliberate and recommend to the Court an answer to the following questions:
>
> 1. Whether the evidence shows beyond a reasonable doubt the existence of at least 1 aggravating circumstance as enumerated in subsection (e) of this section; and
>
> 2. Whether, by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bear upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist.
>
> b. The jury shall report to the Court its final vote by the number of each affirmative and negative votes on each question.

> * * * (d) Determination of sentence. (1) A sentence of death shall be imposed, after considering the recommendation of the jury, if a jury is impaneled, if the Court finds:
>
> a. Beyond a reasonable doubt at least 1 statutory aggravating circumstance; and
>
> b. By a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist. [Emphasis added.]

The statute defies defendant's contention that "nothing in the new law suggests that in requiring a finding beyond a reasonable doubt the legislature was abandoning the unanimity requirement necessary for all factual determinations." First, there is the requirement that "the jury shall report to the Court its final vote by the number of each affirmative and negative votes on each question". That requirement shows that the jury's recommendation need not be unanimous. *See Gattis v. State, supra* at 47-8 ("Thus, in a proper exercise of its legislative power, the General Assembly has given 'express statutory authority' to the jury to render to the Court a less-than unanimous recommendation.") In addition, the statutory requirement that the Court make its own determination regarding the existence of a statutory aggravating circumstance evidences the legislature's intention to abandon the unanimity requirement. The ultimate responsibility for determining the existence of an aggravating circumstance

rests with the Court. The jury makes a recommendations only, and such need not be unanimous.

Defendant's argument ignores the distinction between findings by a jury to determine guilt or innocence and findings regarding sentencing. The right to a jury trial is limited to determining guilt or innocence. *Shelton v. State*, 652 A.2d at 5-6; *Lawrie v. State*, 643 A.2d at 1346; *State v. Cohen*, 604 A.2d at 852; *Gattis v. State, supra* at 45-8. It does not extend to the sentencing phase. *Id.* The jury's findings regarding the aggravating circumstances are a part of the sentencing phase, not a part of the guilt or innocence phase. Thus, there is no constitutional right, either federal or state, to a trial by jury on the finding of the existence of a statutory aggravating circumstance. *Id.*

In conclusion, there is no right pursuant to the Delaware Constitution to unanimity of the jury in connection with the imposition of the death penalty. Defendant's argument on this ground is meritless, and the Court denies the pending motion on this ground.

Irreconcilable Conflict in Testimony

The second ground defendant advances is irreconcilable conflict in testimony. Defendant argues as follows:

> During the course of the trial, Special Agent Ron Poplas testified that he delivered a subpoena to Marguerite Capano in Stone Harbor on or about August 13, 1997. Agent Poplas testified that he did not engage in any questioning of Mrs. Capano. [Footnote omitted.] After service of the subpoena, a Motion to Quash the subpoena was filed by L. Vincent Ramunno. On or about September 5, 1997, the Government

> responded to the Motion to Quash and stated in part that at the time of service "Mrs. Capano refused to answer questions put to her by the agent who served the subpoena." [Emphasis in original.] . . . The conflict in testimony was prejudicial to Mr. Capano and his effort to convince the jury that investigative tactics were unfair and part of a plan to break his family. To the best of counsel's knowledge, the Government's response to the Motion was not in his possession at trial. It was only served upon Mr. Ramunno.

In his memoranda in support of the pending motion, defendant does not develop this argument any further nor does he cite to the law pertinent to this motion. He merely reiterates: "This conflict of testimony was prejudicial to Mr. Capano's effort to convince the jury that the State's investigative tactics were unfair and should result in a new trial being ordered." Defendant's Letter Memorandum dated July 16, 1999 at 13.

Defendant, although he does not articulate it, seeks a new trial based on newly discovered evidence, the response to the Motion to Quash. The test for determining whether he is entitled to such consists of three parts. This test is set forth in *Brittingham v. State*, Del. Supr., 608 A.2d 725 (1991)[4] as follows:

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[4] This citation leads one to a table of decisions without published opinions. A more helpful citation is as follows: *Brittingham v. State*, Del. Supr., 608 A.2d 725, 1991 Del. LEXIS 450, *3 (1991).

> (1) The new evidence must be of such a nature that it would have probably changed the result if presented to the jury;
>
> (2) The evidence must have been newly discovered; it must have been discovered since trial, and the circumstances must be such as to indicate that it could not have been discovered before trial with due diligence; and
>
> (3) The evidence must not be merely cumulative or impeaching.

Judge O'Hara has set forth the requisites in an affirmative manner as follows:

> [A] new trial should be granted where the newly discovered evidence is so conclusive in nature, or of such decisive character, that it can be said, with reasonable certainty, that the verdict would have been changed, provided the petitioner has satisfactorily shown why the evidence was not discovered or produced at the time of trial.

State v. Young, 1982 Del. Super. LEXIS 1062, *22, Del. Super., Cr.A. Nos. 77-09-0001-0004, O'Hara, J. (October 4, 1982). The Court went on to explain regarding impeachment:

> If such impeachment is so important to the main issue, so strong and convincing, that a different result would necessarily follow were a new trial to be granted, it should be granted even though this would seem to be in conflict with the general rule that mere impeaching testimony is not sufficient.

Id.

The first issue is whether the evidence was newly discovered. Counsel has stated: "To the best of counsel's knowledge, the Government's response to the Motion was not in his possession at trial." Docket Entry No. 295. That is not a sufficient allegation to support a motion for a new trial. As is clear from pre-trial motions filed, trial counsel had viewed many documents filed with the United States District Court in and for the District of Delaware in connection with the Federal Grand Jury investigation of Fahey's disappearance. There were four trial counsel, and defendant took an active part in his defense. Knowledge of one is imputed to knowledge of all. If defense counsel and/or defendant did not have knowledge of, possession of and/or access to all documents, including the response to the Motion to Quash, filed in connection with that proceeding, then all four trial counsel and the defendant should have filed affidavits stating such. Absent verified statements establishing the defense absolutely did not have knowledge of or the ability to obtain knowledge of this response to the Motion to Quash, defendant has not established that this constituted "new evidence" which was discovered after the trial. *See State v. Abner*, Del. Super., ID #: 9701021889, Silverman, J. (May 12, 1999).

Second, this evidence,[5] even if presented, would have merely been impeaching. Defendant maintains that he would have used this information to show that the tactics

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[5] I am assuming that it would be established that Detective Poplas told the Federal Government representative that he attempted to question Mrs. Capano and she refused to answer any questions. That fact, however, has not been established.

of the investigators were unfair and part of a plan to break up his family. This Court has constantly been baffled by defendant's assertion that there are some rules of fair play, other than constitutional guarantees, which governed the investigation into the disappearance of Fahey. It would have been of no significance to defendant's defense that the detective questioned Mrs. Capano or the authorities broke a family code of silence in order to determine what happened to Fahey. The evidence would be impeaching of the detective's testimony that he did not question Mrs. Capano, and nothing more.

Finally, if the impeaching evidence was allowed, the outcome of this case would not have been different. Again, because defendant focuses on the "unfairness" of how he was caught and not on the merits of the case, he fails to see that it was the mountain of evidence presented as well as his own testimony which resulted in his conviction. This impeachment evidence would have been of minuscule impact; it does not amount to anything significant which would have changed the outcome of the trial.

In conclusion, defendant has not presented any new evidence which would entitle him to a new trial pursuant to Super. Ct. Crim. R. 33.

Record of Juror's Dismissal

On December 30, 1998, during the trial in this matter, the Court received a letter from the jury foreman. The letter stated as follows in pertinent part:

> Having had several complaints from fellow jurors, I feel compelled to write and inform you

> of the situation. Apparently juror number five has been voicing his opinions of proceedings taking place in court to other members of the panel, jurors number two and seven in particular. He has, in fact, told them that he has already reached a decision in this case and has confided the same to them. They are upset about the situation and have had no success in telling this man that they are not interested in his opinions. While he has not tried to tell me anything, I have tried to make it clear to him that such discussions cannot take place. Some jurors also believe that he has been following the case in the media. As the jury foreman, I felt it was my responsibility to inform the Court and allow you to take whatever action, if any, you deem appropriate.

The Court received a second note from the jury foreman on that same date, which note stated in pertinent part:

> Discussions with the jurors this morning has made it clear even more that number five is trying to influence other members of the jury and has already decided Mr. Capano's guilt. Again, I feel that the Court has to know.

The Court met with all counsel and informed them of the contents of these letters. The Court noted that the juror referenced ("Juror No. 5") was the same juror who previously had to be chastised for reacting verbally to things that were going on in the courtroom. When it was clarified that he was making verbal comments, defense counsel stated: "He has to go."

The Court then called in Juror No. 5 to allow him to hear the allegations against him and to respond thereto. I quote from the transcript:

Q. ***

I have had a report from three jurors, three separate jurors, that indicate that you have been attempting to influence the jury, that you have been responding audibly to jurors on either side of you during the trial and that you have expressed an opinion as to the guilt or innocence of Mr. Capano to other jurors during the deliberations the last few days.

A. I have never expressed any opinion whatsoever. And as far as talking to any jurors, I don't believe I have ever mentioned anything to anybody on either side of me.

Q. But do you know any reason why three jurors would inform the Court that you have?

A. No, I do not. And if – if it is so – the Court so feels that way, I will gladly step out. Why they would say that, I do not know.

Q. Well, I certainly don't want to do anything that's an injustice to you, sir.

A. Unless –

Q. But my problem is that I now have a written letter that's a part of the record indicating that you have actively attempted to influence three jurors. And the members of the jury have complained about that.

A. I have never spoken to any jurors concerning the case. I don't know where they are getting that idea. However, if you so feel – I

don't want to disturb this case. If you want me off, I will gladly step off.

Q. It's not a question of wanting you off, sir, but I think at this particular stage I don't have much choice with the complaints of the other jurors. I think I have to excuse you.

A. Well, I would – I don't really mind one bit.

Q. All right. Well, I appreciate – I mind, because it seems to me that you have served with diligence for a long period of time. And it's a shame to not allow you to participate in the decision making process, but I don't think I have a whole lot of chance – choice.

A. Well, I would like – I know you won't do it, but I would like the right to know who is accusing me of influencing the jury.

Q. Well, the jurors on either side of you have complained to the foreman and another person has complained. And I don't know any of the names myself, sir. I asked your name. I stuck with numbers the whole way through. I don't even know who the jurors are.

A. Well, it matters not to me.

Q. All right.

A. It does hurt me.

Q. I know it does. And that's why I brought you in and talked to you, because it's not a question – not a question of this being particularly fair, but under the circumstances I don't have much of a choice.

A. That's fine. I agree. If that's the way you conduct yourself, that's fine. That's the way the court is conducted.

Q. Okay.

A. And I know – no bad feeling to anybody.

Q. Well, I appreciate your understanding. You certainly have our respect, but there is not much we can do under the circumstances.

A. Fine.

Juror No. 5 clearly was informed of the allegations against him and who two of the accusers were. Juror No. 5 denied the allegations; he did not proffer any reason for why these allegations might be untrue.

After his dismissal, Juror No. 5 sent the Court a letter which the Court cannot locate. However, it is the Court's recollection, and Juror No. 5 has confirmed, that in the letter, Juror No. 5 apologized for having to leave the case and expressed his position that he did not try to affect anyone's judgment and that he never talked to the two women who accused him of trying to influence them. He expressed his concerns that he had not had an opportunity to face the people who accused him and he wished he had had that opportunity. In that letter, Juror No. 5 did not allege that any of the jurors acted improperly or that there was a conspiracy to have him removed from the jury.

Juror No. 5 explained that after the trial was over, he called one of the defense attorneys:

I called Mr. Maurer after the trial was over. I was out of it, had nothing to do with it, and I

> told him I felt that he had done, under the circumstances, he had presented the best case he could, and I was sorry that he had lost because, as I said in the letter there to Mr. Ramunno, that it's quite possible that I was leaning the other way.
>
> And it hurt me more to say that I was going to think that that whole family and that old grandmother and those children would be looking at me and say, oh, well, I don't want to use the word, might have had something with my so and so being convicted.

Thereafter, Juror No. 5 contacted Mr. Oberly's housekeeper in an attempt to talk with Mr. Oberly. Mr. Oberly, who was concerned about contacting a juror directly, had a third party contact Juror No. 5.

On March 1, 1999, an investigator interviewed Juror No. 5. A review of a transcript[6] of that interview indicates the following accusations made by Juror No. 5.[7] One of the jurors indicated to Juror No. 5 that he felt defendant was guilty. Another of the jurors was trying to influence him by saying she did not want to be on a hung jury.

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[6] This transcript is not authenticated or certified.

[7] There are some accusations made that are irrelevant to this proceeding, such as one group of jurors was loud and some of the jurors enjoyed the testimony regarding sex. Juror No. 5 obviously did not approve of some of the other jurors' behavior. The Court only concerns itself with allegations pertaining to conduct such as discussing the case before deliberations, reaching a decision before being charged, or conspiring to have him removed from the jury.

In this interview, Juror No. 5 acknowledged that the Judge told him that he had been accused of trying to influence some members of the jury.

A letter dated April 16, 1999 from L. Vincent Ramunno, Esquire to defendant's attorney relates the following. On April 15, 1999, Juror No. 5 contacted Mr. Ramunno, who is defendant's brother-in-law. Juror No. 5 wanted to know why he was dismissed.[8] He wanted to know whether it was because the attorneys had told the Court that he was seen in a restaurant talking about the case.[9] Mr. Ramunno explained that such was not the case. Juror No. 5 complained that he had not been told of what he was accused nor had he been given the opportunity to deny or respond to the accusations. When Mr. Ramunno told Juror No. 5 that he believed he had been removed because several jurors accused him of expressing his feelings that the defendant was guilty, he responded that such was not true. Juror No. 5 then said that the jurors schemed to get him off the jury by making false allegations because they were afraid he would vote to acquit the defendant, thereby causing a hung jury. According to Mr. Ramunno, Juror No. 5 "explained that he does not believe that Tom killed Fahey and would have never convicted him. He believes that the jury knew that because of several comments or things that happened."

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[8] As noted above, the Court clearly explained to him why he was dismissed.

[9] Before Juror No. 5 was brought into the Robing Room, when the attorneys were trying to figure out who Juror No. 5 was, they asked if it was the juror "supposedly seen talking about the case in a restaurant". The Court clarified Juror No. 5 was a different person.

Juror No. 5 also alleged that a juror indicated to him that defendant was guilty. He also alleged that another juror told him that she did not want to be a part of a hung jury.

In light of the foregoing, this Court conducted an in camera interview of Juror No. 5 on July 8, 1999.[10] I summarize below the substance of that interview.

Juror No. 5 confirmed that the substance of the interview of March 1, 1999 was correct. He made the following corrections to the letter from Mr. Ramunno:

> Basically it is correct; only that the information that I did say was that I was told by a good friend who heard in Wilmington that the Capanos wanted me off the case because – something to the effect that his brother-in-law had overheard someone talking.
>
> That's basically what he said about me, and that I was under the impression from what I was told that he was guilty, guilty, guilty, and it astounded me. I didn't know where that information ever came from.

The Court then went on to question him concerning alleged juror improprieties. Juror No. 5 related that one day while he was serving, another juror came in and started discussing the case with him and said the defendant was guilty. He also explained that he had made the jurors angry on at least one occasion. He said he did not

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[10] Because the Court could not locate any law in Delaware which provided guidance in this situation, it followed the basic format as set forth in *United States v. Piccarreto*, W.D.N.Y., 718 F. Supp. 1088 (1989). However, unlike the District Court for the Western District of New York, the Court allowed the attorneys to be present at the interview.

say much except when he blew his top a couple of times. Juror No. 5 noted that one of the jurors said several times that she did not want to be on a hung jury, and he told her that could happen.

When asked if there were any reason why he did not mention in his letter to the Court his theory that the other jurors wanted to get rid of him, he responded:

> No, because at that time that had nothing to do with the fact that I was just dismissed. You know, when something is over and you have been through it the weeks that we went through it, there are always little things that come into your mind and make you wonder how much did they really wonder what the old man was thinking.
>
> I was a little uncomfortable. It was a sixth sense you have that you just can't put down a reason. It's just that I just don't know. I had nothing personal against any one of those jurors.

Defendant seeks to obtain a new trial in connection with the dismissal of Juror No. 5. He makes two basic arguments. First, the Court failed to inform Juror No. 5 of the accusations against him and it failed to provide him with the opportunity to respond to those accusations. Second, juror misconduct occurred. The first basis for asserting juror misconduct is the allegation that the jurors conspired to have Juror No. 5 removed from the case and they accomplished that removal by lying to the Court about Juror No. 5. The second basis is the allegation that at least one of the jurors was discussing this case before it was submitted to the jury and that same juror decided that defendant was guilty before deliberations began.

Defendant's arguments that the Court failed to advise Juror No. 5 of the accusations against him and it failed to provide him with the opportunity to respond thereto are blatant misrepresentations of the facts. When the State points out these misrepresentations, defendant backtracks and then misconstrues the facts, arguing, among other things, that the circumstances of the initial confrontation with Juror No. 5 were such that Juror No. 5 really could not respond to the accusations against him. The record speaks for itself and defendant's misrepresentations are ignored.

Juror No. 5 clearly was advised of the accusations against him and told who two of his accusers were. The Court provided him with the opportunity to respond to those accusations. Juror No. 5 did not adequately respond thereto. The Court dismissed him, and the defense had no objections to his dismissal.

Defendant argues that the dismissal was the result of a conspiracy. In order to accept that argument, the Court would have to accept Juror No. 5's contentions. Therefore, the Court must determine the question of his credibility. A review of the chronology of pertinent events shows that Juror No. 5's perception of the facts has changed over time.

The Court clearly informed Juror No. 5 of the accusations regarding him. After his dismissal, Juror No. 5 sent a letter to the Court wherein he did not make any accusations of a conspiracy or of juror misconduct. Thereafter, a defense investigator contacted Juror No. 5. After that contact, Juror No. 5 alleged a conspiracy theory and juror misconduct. Juror No. 5 thereafter contacted Mr. Ramunno, and during his contact with him, Juror No. 5

allegedly asked why he was dismissed from the jury when he knew the reason for his dismissal.

After considering the emerging nature of his testimony and his demeanor during his testimony under oath, I find his testimony unreliable and lacking in credibility. Consequently, there is no need for me to conduct a further investigation of the jurors or to analyze any facts in light of the law regarding juror misconduct. Therefore, defendant is not entitled to a new trial on this basis.

By letter dated August 25, 1999, defendant submitted further materials regarding another juror who was dismissed from jury duty after she was arrested on several drug and drug-related charges. This juror shall be referred to hereinafter as Juror No. 3.

Defendant provided the Court with a transcript of an interview with Juror No. 3 which took place on July 12, 1999. Juror No. 3 was interviewed by Robert Shannon,[11] "for Mr. Charles Oberly", who is defense counsel. I note in passing that this interview may have been improper. *See* Delaware Lawyers' Rules of Professional Conduct, Rule 3.10.[12]

The State is rightfully upset about the timing of this submission. Obviously the Court and the State were

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[11] This is the same person who interviewed Juror No. 5.

[12] This Rule provides:

(d) After discharge of the jury from further consideration of a case with which the lawyer was connected, a lawyer shall not ask questions of or make comments to a member of that jury.

(e) A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireman or a juror.

unaware of the interview because defendant did not request permission from the Court to conduct the interview. Although Mr. Oberly represents that he was not aware of the interview at the time it was conducted on July 12, 1999 and it only recently came to his attention, the Court attributes knowledge to Mr. Oberly of his representative's actions. The late submission of the interview has put an unnecessary burden on the State and the Court. With that said, the Court will review the submission.

The substance of that interview is summarized below.[13]

Juror No. 3 is friends with Juror No. 5. One of the jurors took notes out of the room. Then after going off the record and discussing with the investigator "some things that were happening during the trial of Thomas Capano", Juror No. 3 stated:

> Me and . . . [Juror No. 5] had conversed together a bit, you know, here and there, and we had the same point of views of the jury, or of the trial, and I just think it would have been a totally different outcome of the verdict if we, me

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[13] As was the case with Juror No. 5, I deal only with matters of substance. It is irrelevant that the jurors became cross with one another, did not exhibit common courtesy to one another, flirted with one another, or laughed about the testimony concerning sex. I also ignore allegations by Juror No. 3 which are not based upon anything she witnessed. The only matters with which the Court is concerned are those regarding alleged premature decisions on defendant's guilt and taking notes out of the jury room.

> and . . . [Juror No. 5], had sat in through the trial.
>
> * * *
>
> I think it probably would have been a hung jury. At least by two.[14]

Juror No. 3 said that she thought some of the members of the jury had a preconceived notion that the defendant was guilty. During this line of questioning, the tape recorder was again turned off "while . . . [Juror No. 3] recollects her thoughts." The interview resumed after three minutes.

Again, the Court is faced with a credibility question. If the Court gave credence to this information, then it would need to interview Juror No. 3. The Court, however, does not find the information credible or reliable. There are several reasons for that conclusion. First, Juror No. 3 and Juror No. 5 are friends. Their stories have been told after they have been contacted by defendant's representatives. Their accusations are similar. Finally, the off-the-record conversations with Juror No. 3 are problematical from a credibility standpoint.

The Court will not allow defendant to invent problems with a jury which carried out its duties as instructed. The Court will not conduct an interview of Juror No. 3 because the circumstances of the defense interview make it unreliable.

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[14] As an aside, these comments lead the Court to surmise that Juror No. 3 and Juror No. 5 were discussing the case before it was submitted to them for deliberation.

In conclusion, defendant is not entitled to a new trial on any ground pertaining to alleged juror misconduct.

Requested Interview of MacIntyre

Defendant has submitted a letter dated July 1, 1999 from a paralegal who worked on the defense team. In that letter, the paralegal relates that while the attorneys were at sidebar and while Deborah MacIntyre was on the witness stand testifying for the State, she conversed with someone. Defendant requests that he be allowed to interview Ms. MacIntyre regarding this alleged communication.

Obviously, the Court did not observe the alleged event. The defense did not point it out when it allegedly occurred and when the Court could have taken appropriate action.

Defendant's paralegal's knowledge about this event is imputed to defendant. He has waived the opportunity to question Ms. MacIntyre about any alleged conversation by failing to raise the matter before the Court when it occurred. The request for an interview is denied.

CONCLUSION

For the foregoing reasons, defendant's pending motion is denied and his request to interview Ms. MacIntyre also is denied.

IT IS SO ORDERED.

APPENDIX D

11 Del. C. § 636 (2000)

§ 636. Murder in the first degree; class A felony

(a) A person is guilty of murder in the first degree when:

(1) The person intentionally causes the death of another person;

(2) In the course of and in furtherance of the commission or attempted commission of a felony or immediate flight therefrom, the person recklessly causes the death of another person;

(3) The person intentionally causes another person to commit suicide by force or duress;

(4) The person recklessly causes the death of a law-enforcement officer, corrections employee or fire fighter while such officer is in the lawful performance of duties;

(5) The person causes the death of another person by the use of or detonation of any bomb or similar destructive device;

(6) The person, with criminal negligence, causes the death of another person in the course of and in furtherance of the commission or attempted commission of any degree of rape, unlawful sexual intercourse in the first or second degree, kidnapping, arson in the first degree, robbery in the first degree, burglary in the first degree, or immediate flight therefrom;

(7) The person causes the death of another person in order to avoid or prevent the lawful arrest of any

person, or in the course of and in furtherance of the commission or attempted commission of escape in the second degree or escape after conviction.

(b) Murder in the first degree is a class A felony and shall be punished as provided in § 4209 of this title.

APPENDIX E

11 Del. C. § 4209 (2000)

§ 4209. Punishment, procedure for determining punishment, review of punishment and method of punishment for first-degree murder

(a) *Punishment for first-degree murder.* – Any person who is convicted of first-degree murder shall be punished by death or by imprisonment for the remainder of the person's natural life without benefit of probation or parole or any other reduction, said penalty to be determined in accordance with this section.

(b) *Separate hearing on issue of punishment for first-degree murder.*

(1) Upon a conviction of guilt of a defendant of first-degree murder, the Superior Court shall conduct a separate hearing to determine whether the defendant should be sentenced to death or to life imprisonment without benefit of probation or parole as authorized by subsection (a) of this section. If the defendant was convicted of first-degree murder by a jury, this hearing shall be conducted by the trial judge before that jury as soon as practicable after the return of the verdict of guilty. Alternate jurors shall not be excused from the case prior to submission of the issue of guilt to the trial jury and shall remain separately sequestered until a verdict on guilt is entered. If the verdict of the trial jury is guilty of first-degree murder said alternates shall sit as alternate jurors on the issue of punishment. If, for any reason satisfactory to the Court, any member of the trial jury is excused from participation in the hearing on punishment, the trial

judge shall replace such juror or jurors with alternate juror or jurors. If a jury of 12 jurors cannot participate in the hearing a separate and new jury, plus alternates, shall be selected for the hearing in accordance with the applicable rules of the Superior Court and laws of Delaware, unless the defendant(s) and the State stipulate to the use of a lesser number of jurors.

(2) If the defendant was convicted of first-degree murder by the Court, after a trial and waiver of a jury trial or after a plea of guilty or nolo contendere, the hearing shall be conducted by the trial judge before a jury, plus alternates, empaneled for that purpose and selected in accordance with the applicable rules of the Superior Court and laws of Delaware, unless said jury is waived by the State and the defendant in which case the hearing shall be conducted, if possible, by and before the trial judge who entered the finding of guilty or accepted the plea of guilty or nolo contendere.

(c) *Procedure at punishment hearing.*

(1) The sole determination for the jury or judge at the hearing provided for by this section shall be the penalty to be imposed upon the defendant for the conviction of first-degree murder. At the hearing, evidence may be presented as to any matter that the Court deems relevant and admissible to the penalty to be imposed. The evidence shall include matters relating to any mitigating circumstance and to any aggravating circumstance, including, but not limited to, those aggravating circumstances enumerated in subsection (e) of this section. Notice in writing of any aggravating circumstances and any mitigating circumstances shall be given to the other

side by the party seeking to introduce evidence of such circumstances prior to the punishment hearing, and after the verdict on guilt, unless in the discretion of the Court such advance notice is dispensed with as impracticable. The record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant or the absence of any such prior criminal convictions and pleas shall also be admissible in evidence.

(2) At the hearing the Court shall permit argument by the State, the defendant and/or the defendant's counsel, on the punishment to be imposed. Such argument shall consist of opening statements by each, unless waived, opening summation by the State, rebuttal summation by the defendant and/or the defendant's counsel and closing summation by the State.

(3) a. Upon the conclusion of the evidence and arguments the judge shall give the jury appropriate instructions and the jury shall retire to deliberate and recommend to the Court an answer to the following questions:

1. Whether the evidence shows beyond a reasonable doubt the existence of at least 1 aggravating circumstance as enumerated in subsection (e) of this section; and

2. Whether, by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bear upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist.

b. The jury shall report to the Court its final vote by the number of each affirmative and negative votes on each question.

(4) In the instructions to the jury the Court shall include instructions for it to weigh and consider any mitigating circumstances or aggravating circumstances and any of the statutory aggravating circumstances set forth in subsection (e) of this section which may be raised by the evidence. The jury shall be instructed to weigh any mitigating factors against the aggravating factors.

(d) *Determination of sentence.*

(1) A sentence of death shall be imposed, after considering the recommendation of the jury, if a jury is impaneled, if the Court finds:

a. Beyond a reasonable doubt at least 1 statutory aggravating circumstance; and

b. By a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which bears upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist.

(2) Otherwise, the Court shall impose a sentence of imprisonment for the remainder of the defendant's natural life without benefit of probation or parole or any other reduction.

(3) If the Court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based.

(e) *Aggravating circumstances.*

(1) In order for a sentence of death to be imposed, the judge must find that the evidence established beyond a reasonable doubt the existence of at least 1 of the following aggravating circumstances which shall apply with equal force to accomplices convicted of such murder:

a. The murder was committed by a person in, or who has escaped from, the custody of a law-enforcement officer or place of confinement.

b. The murder was committed for the purpose of avoiding or preventing an arrest or for the purpose of effecting an escape from custody.

c. The murder was committed against any law-enforcement officer, corrections employee or firefighter, while such victim was engaged in the performance of official duties.

d. The murder was committed against a judicial officer, a former judicial officer, Attorney General, former Attorney General, Assistant or Deputy Attorney General or former Assistant or Deputy Attorney General, State Detective or former State Detective, Special Investigator or former Special Investigator, during, or because of, the exercise of an official duty.

e. The murder was committed against a person who was held or otherwise detained as a shield or hostage.

f. The murder was committed against a person who was held or detained by the defendant for ransom or reward.

g. The murder was committed against a person who was a witness to a crime and who was killed for the purpose of preventing the witness's appearance or testimony in any grand jury, criminal or civil proceeding involving such crime, or in retaliation for the witness's appearance or testimony in any grand jury, criminal or civil proceeding involving such crime.

h. The defendant paid or was paid by another person or had agreed to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

i. The defendant was previously convicted of another murder or manslaughter or of a felony involving the use of, or threat of, force or violence upon another person.

j. The murder was committed while the defendant was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any degree of rape, unlawful sexual intercourse, arson, kidnapping, robbery, sodomy or burglary.

k. The defendant's course of conduct resulted in the deaths of 2 or more persons where the deaths are a probable consequence of the defendant's conduct.

l. The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, use of an explosive device or poison or the defendant used such means on the victim prior to murdering the victim.

m. The defendant caused or directed another to commit murder or committed murder as an agent or employee of another person.

n. The defendant was under a sentence of life imprisonment, whether for natural life or otherwise, at the time of the commission of the murder.

o. The murder was committed for pecuniary gain.

p. The victim was pregnant.

q. The victim was severely handicapped or severely disabled.

r. The victim was 62 years of age or older.

s. The victim was a child 14 years of age or younger, and the murder was committed by an individual who is at least 4 years older than the victim.

t. At the time of the killing, the victim was or had been a nongovernmental informant or had otherwise provided any investigative, law enforcement or police agency with information concerning criminal activity, and the killing was in retaliation for the victim's activities as a nongovernmental informant or in providing information concerning criminal activity to an investigative, law enforcement or police agency.

u. The murder was premeditated and the result of substantial planning. Such planning must be as to the commission of the murder itself and not simply as to the commission or attempted commission of any underlying felony.

v. The murder was committed for the purpose of interfering with the victim's free exercise or enjoyment of any right, privilege or immunity protected by the First Amendment to the United States Constitution, or because the victim has exercised or enjoyed said rights, or because of the victim's race, religion, color, disability, national origin or ancestry.

(2) In any case where the defendant has been convicted of murder in the first degree in violation of any provision of § 636(a)(2)-(7) of this title, that conviction shall establish the existence of a statutory aggravating circumstance and the jury, or judge where appropriate, shall be so instructed. This provision shall not preclude the jury, or judge where applicable, from considering and finding the statutory aggravating circumstances listed in this subsection and any other aggravating circumstances established by the evidence.

(f) *Method and imposition of sentence of death.* – The imposition of a sentence of death shall be upon such terms and conditions as the trial court may impose in its sentence, including the place, the number of witnesses which shall not exceed 10, and conditions of privacy, and shall occur between the hours of 12:01 a.m. and 3:00 a.m. on the date set by the trial court. The trial court shall permit one adult member of the immediate family of the victim, as defined in § 4350(c) of this title, or the victim's designee, to witness the execution of a sentence of death pursuant to the rules of the court, if the family provides reasonable notice of its desire to be so represented. Punishment of death shall, in all cases, be inflicted by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such person

sentenced to death is dead, and such execution procedure shall be determined and supervised by the Commissioner of the Department of Correction. The administration of the required lethal substance or substances required by this section shall not be construed to be the practice of medicine and any pharmacist or pharmaceutical supplier is authorized to dispense drugs to the Commissioner or the Commissioner's designee, without prescription, for carrying out the provisions of this section, notwithstanding any other provision of law. Such sentence may not be carried out until final review thereof is had by the Delaware Supreme Court as provided for in subsection (g) of this section. The Court or the Governor may suspend the execution of the sentence until a later date to be specified, solely to permit completion of the process of judicial review of the conviction.

If the execution of the sentence of death as provided above is held unconstitutional by a court of competent jurisdiction, then punishment of death shall, in all cases, be inflicted by hanging by the neck. The imposition of a sentence of death shall be upon such terms and conditions as the trial court may impose in its sentence, including the place, the number of witnesses and conditions of privacy. Such sentence may not be carried out until final review thereof is had by the Delaware Supreme Court as provided in subsection (g) of this section. The Court or the Governor may suspend the execution of the sentence until a later date to be specified, solely to permit completion of the process of judicial review of the conviction.

(g) *Automatic review of death penalty by Delaware Supreme Court.*

(1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the recommendation on and imposition of that penalty shall be reviewed on the record by the Delaware Supreme Court. Absent an appeal having been taken by the defendant upon the expiration of 30 days after the sentence of death has been imposed, the Clerk of the Superior Court shall require a complete transcript of the punishment hearing to be prepared promptly and within 10 days after receipt of that transcript the clerk shall transmit the transcript, together with a notice prepared by the clerk, to the Delaware Supreme Court. The notice shall set forth the title and docket number of the case, the name of the defendant, the name and address of any attorney and a narrative statement of the judgment, the offense and the punishment prescribed. The Court shall, if necessary, appoint counsel to respond to the State's positions in the review proceedings.

(2) The Supreme Court shall limit its review under this section to the recommendation on and imposition of the penalty of death and shall determine:

a. Whether, considering the totality of evidence in aggravation and mitigation which bears upon the particular circumstances or details of the offense and the character and propensities of the offender, the death penalty was either arbitrarily or capriciously imposed or recommended, or disproportionate to the penalty recommended or imposed in similar cases arising under this section.

b. Whether the evidence supports the judge's finding of a statutory aggravating circumstance as enumerated in subsection (e) of this section and, where applicable, § 636(a)(2)-(7) of this title.

(3) The Supreme Court shall permit the defendant and the State to submit briefs within the time provided by the Court, and permit them to present oral argument to the Court.

(4) With regard to review of the sentence in accordance with this subsection, the Court shall:

a. Affirm the sentence of death.

b. Set aside the sentence of death and remand for correction of any errors occurring during the hearing and for imposition of the appropriate penalty. Such errors shall not affect the determination of guilt and shall not preclude the reimposition of death where appropriately determined after a new hearing on punishment.

c. Set forth its findings as to the reasons for its actions.

(h) *Ordinary review not affected by section.* – Any error in the guilt phase of the trial may be raised as provided by law and rules of court and shall be in addition to the review of punishment provided by this section.

APPENDIX F

IN THE SUPERIOR COURT OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
VS.	)	9711006198
THOMAS J. CAPANO,	)	
	)	
Defendant.	)	
	)	

BEFORE: HON. WILLIAM SWAIN LEE, J.
and a jury

Trial Transcript
October 26, 1998

* * *

[129] Q. Okay. Let me ask you directly. Did you ever hear that she fainted in the Governor's office in Wilmington on Wednesday, June 12th, 1996?

A. Not until much, much later.

Q. But you did hear that later?

A. I didn't hear it until we started with the trial and everything involved in this.

Q. Did you also hear that she called Tom Capano to come get her?

A. Yes, I heard that.

Q. And that Tom Capano came and got her?

A. Yes.

Q. And that she ended up taking the rest of the afternoon off?

A. Yes.

* * *

November 10, 1998

* * *

[138] If you thought I was bad on the stand, God fucking help you [139] if this goes to trial. I'll think up even more shit to keep my ass out of fucking jail. And I'll make up fucking shit as I go along to keep Tommy in there for fucking life. I hate him. You got ten fucking minutes to call me back or you'll never see my kids again. I'm not threatening you, but if you don't call me back in ten minutes, you can go fuck yourself. . . .

Did you make that call and make that statement, Gerry?

A. I'm sure I did, if you have it on tape.

* * *

December 22, 1998

* * *

[36] Q. That's okay.

After Deborah left, can you give us the best estimate as to what time she left? I know it's not precise.

A. I would say she left between two and 2:30 in the morning?

Q. What did you do after she left?

A. I sat by myself and battled my emotions, one, and then started thinking of what I was going to do next.

Q. What did you conclude that you were going to do next?

A. That I was going to attempt to keep this hidden, and that I was going to bury Anne Marie's – the cooler with Anne Marie in it.

Q. Did you decide how you were going to do that, do both of those things, how you were going to [37] keep it secret and how you were going to bury the cooler?

A. Well, I was going to keep it secret by not telling anyone and also telling Debbie not to tell anyone. I decided that the best way – it occurred to me that the best way for me to dispose of the cooler was not – was a burial at sea.

Q. Now, going back, to keep it secret, you had had a year's experience as a defense lawyer and two years as prosecutor.

A. Yes.

Q. Did you know whether or not you would be a suspect immediately, having been the last person to see Anne Marie?

A. Yes.

Q. Did you know that incredible heat would come down on you?

A. Well, I thought some heat would come down on me but nothing like what did come down.

Q. Did you know –

MR. CONNOLLY: Objection; leading.

Q. Would you tell us, sir, how you intended to keep this secret?

[38] A. I wasn't sure. I mean in my mind I wasn't exactly functioning at a fully rational state. All I knew was that I wanted to keep a secret which ultimately I changed my mind on that.

But at the time we're talking about, I didn't have a specific plan; just, you know, I have to keep this quiet to selfishly protect myself and unselfishly protect Debbie.

* * *

December 30, 1998

* * *

[21] Q. And you were also thinking that if you got rid of the gun, you would make it impossible to disprove or corroborate what occurred in that apartment; correct?

A. No, I don't believe that's the case. I mean, any thinking I was doing that night, as I said, was unclear, the result of panic. And I also have said that it was cowardly and reprehensible. But I wasn't so specific that – with respect to the gun that I was going through the analysis that you just went through, because that indicates – you

know, that's a clear, very rational analysis. And I was in no condition to do that that night. Basically I wanted to get rid of the gun because I wanted to get rid of the gun.

* * *

January 11, 1999

* * *

[165] MR. O'DONNELL: We said we have to persuade [166] you. Your inclination was not to give lessers. I've been dispatched to make that argument.

THE COURT: All right.

* * *

[199] Now, are we ready to address the issue of proposed lessers? Anything we have now is ready to go to the printer.

* * *

MR. O'DONNELL: Yes. This is a little bit complicated. And hopefully, I think I can present it in about five minutes if I'm not interrupted. If that helps at all.

THE COURT: I'll try not to interrupt you, Jack.

MR. O'DONNELL: Okay. It seems to me that, well, we know that the indictment charges first degree murder, which is intentional killing as defined by the instructions committed by a voluntary act of the defendant.

We know what his testimony is, which is essentially that he did not do that. There's very little direct evidence

in this case concerning the events of June 27. State got a few things but, frankly, [200] most of the strength of their case goes more to substantial planning, the premeditation part which is not something the jury decides now than it does to the question of intent.

And conversely, we have evidence that falls on the other side. For example, some of the evidence in favor of the State: Debby MacIntyre says she purchased the gun for him; he denies that; the testimony concerning the extortion that comes from various witnesses and has come in different packages; the cooler, whether it was bought for the purpose the State intends or whether it was bought at Joe Capano's suggestion; whether Tom was a jealous maniac or not.

We believe that there's substantial evidence in the record to refute the issue of an intentional killing; namely, the purchase of the Jackson Brown tickets, e-mail connecting – or asking her to save that date in August; that came out in April or May; the fact that Kay Ryan was surprised to see Tom that morning; the fact that there was no plan to see Gerry and, in fact, Gerry and Louie both say it was only pure luck that Gerry was there; normally, he's at Stone Harbor in late June; Susan testified Tom was fine when she saw him [201] 5:30, six o'clock; testimony of various witnesses earlier in the week and on the 27th; Tom was trying to set up a golf game for the 28th; Henry Supinski's testimony that he expected to walk with Tom Capano on the 28th – all of this evidence cuts against the grain of an intentional killing.

We know that under Ward versus State there must be a rational basis in the evidence for you to give lessers.

What the Court indicated last week is that the Court is under the belief at this point that either the jury will come back with a verdict of murder in the first degree or, if they accept Tom's explanation, it was an accident for which he has no criminal culpability.

It seems to us, and we are specifically making a request that the Court charge in the following lessers; second degree murder, manslaughter, criminally negligent homicide, and abuse of a corpse,

THE COURT: I don't believe abuse of a corpse is a lesser, and for that reason, I mean, I don't think you can find anything within intentional – within the definition of intentional homicide that involves abuse of a corpse. This is a separate offense and therefore [202] I'm not going to charge on that as a lesser.

Let' address the others. Excuse the interruption. I didn't want to waste time on that because I wasn't going to buy it.

MR. O'DONNELL: At the end, I would like to throw in two cents to complete the record for appellate purposes on that.

It seems to me that the jury could well conclude that Tom Capano's action – if Tom Capano was to be believed, then his reaching out for the arm of Debby MacIntyre is in fact what caused that gun to discharge, which then becomes the proximate cause of Anne Marie Fahey's death. It seems that the jury could conclude under the circumstances as he described then it was reckless, that he had an indifference to the risk of what his action might do, which would support second degree murder, or it

was plain and simple reckless which would support manslaughter, or that he simply was unaware of the risk of death by doing that because he didn't see a clip in the gun and, therefore, it was negligently culpable.

There is one case that's not exactly on point. Well, I've done most of the research. Gene has given me [203] all his cheat sheets from trying these cases, couldn't find anything directly on point. I don't know. This state has one case, Zebrowski versus State, that is analogous in a way. I got the cite here.

Is the Court familiar with that case?

THE COURT: No.

MR. O'DONNELL: 715 A.2d 75.

MR. OBERLY: What page?

MR. O'DONNELL: Seventy-five. In that case, two guys decided to take a semi-automatic handgun after doing drugs and drinking all day and rob the gas station. One of the defendants, Sarro, S-A-R-R-O, was cut a deal with the State, testified against Zebrowski. He never testifies. The opinion doesn't tell you exactly what he said. But the inference there, certain testimony presented in the record comes from his agreement that was admitted with both side's consent. And that is that Zebrowski goes and points the gun at the attendant. The attendant doesn't move. Doesn't really comply. The gun is fired. The attendant dies.

At trial, Zebrowski testifies that Sarro, the other co-defendant, punched the attendant in the mouth which caused him to flinch and the gun accidentally [204] discharged. That was his defense at trial.

There was evidence also presented by an ATF expert that the trigger pull on that particular gun was 12 and a half pounds, substantially more than what we have here, and that Zebrowski was intimately familiar with the use of firearms based on his background and experience, which is the direct opposite of what we have here. The evidence in the record here I think rather conclusively is that Tom Capano didn't know a damn thing about guns. That comes from Gerry. That only distinguishing facts between the two cases was the pointing of the gun.

Now, in Zebrowski, the trial court gave instructions on second degree murder and manslaughter, and the issue on appeal was whether it was error to not give criminally negligent homicide. And the Supreme Court agrees with the trial court that it was not error to do that because of the intentional pointing of the gun which in fact we don't have in this case. But it seems to me that under those circumstances where the defendant testifies essentially that there was an accident, the Delaware Supreme Court has agreed that it was proper, and I'm requesting the charge for second [205] degree murder and for manslaughter.

It seems to me because of the dissimilarity in the facts in this case, the reason for not charging criminally negligent homicide in this case is not present in this case. And therefore, it would be proper for the Court to charge on criminally negligent homicide here as well.

The last argument I would make is, although this case I'm not citing for any other reason than the language, is Gates versus State, 424 A.2d 18. It relies on Keeble versus United States, one of the first U.S. Supreme

Court decisions along with Beck versus Alabama on lessers; Keeble 412 U.S. 205, that due process, and I would argue under both Delaware and United States Constitution, guarantees a defendant instructions on lesser includeds if the evidence, under any stretch of the evidence, warrants it. And the reason for that is if there's any evidence in the record the jury should not be required to have to choose only between the extremes. And there's an implication that the due process clause of fundamental fairness jumps in at that point.

MR. MAURER: Just a moment to consult.

[206] MR. O'DONNELL: One last point is this. Since the State has not presented any direct evidence of what happened that night, including no direct evidence as to whether or not the killing was intentional, the jury is entitled to infer from that that any killing that occurred in that room was not intentional and therefore could have been recklessly indifferent, whatever all the words are in the standard for second degree murder, or reckless pursuant to the manslaughter standard, or criminally negligent pursuant to the criminally negligent homicide standard.

You want to jump in here?

MR. MAURER: No. I was just going to say that last argument is something we discussed earlier very briefly. We argue that the absence of any direct evidence of what occurred in that room allows the jury to reach a conclusion that if in fact they believe that Tom Capano killed her, evidence of recklessness or criminal negligence is equally plausible to that of intent. And on that basis, which is a separate basis I think than the other request,

we're saying if they reach the conclusion that Tom killed her, while there's no direct evidence as to what occurred in the room, and [207] therefore either conclusion or any of those conclusions are equally plausible.

THE COURT: I understand that argument and I'll give the State a chance to respond to it. My concern here is that there's no question that intent is being proffered by the State in this particular case based upon circumstantial evidence of prior preparation, which, although it is an aggravating circumstance in this case, is a showing of planning and, therefore, the intent to carry out the plan which you've created and the subsequent acts which tend to give some indication of guilt as to what is of course subject to argument. The fact of the matter is that the State's theory produces some evidence of intent, but there isn't any evidence of recklessness or negligence in this particular case. That's not there. And Jack's basic argument is that it may have been reckless or negligent to try and disarm a woman with a gun.

I'm sorry, folks. I'll never let that go to the jury. If that's what the State was relying on, you'd have an acquittal right here. If I was going to acquit on it, I sure as heck can't charge it as a lesser included. I don't think there's anything there. If all [208] we had now was his statement and there was no other evidence to be considered, that's an acquittal. If I accept his testimony, there's no way I'd let that go to a jury. I think if I wouldn't let it as a matter of law – I would rule he was not guilty under

those circumstances, there's no way I could charge as a lesser included, gentlemen.

* * *

January 28, 1999

* * *

[72] Now, the first question, has the State proven beyond a reasonable doubt that the murder of Anne Marie Fahey was committed as a result of substantial planning [73] and premeditation, I'm barely going to touch upon, because it was rather unusual about this case, because we did not have a body, because the only living person who knows exactly what happened at the instant of Anne Marie Fahey's death is Tom Capano. As a result of the absence of all the forensic evidence, the State proved intent by showing the planning that the defendant had engaged in beginning at least as early as February of 1996 when he approached Gerry the first time and he continued.

So what I'll do is just remind you of some of the categories that I discussed in the closing argument of the guilt phase. The things to look at.

* * *

IN THE SUPERIOR COURT OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
VS.	)	9711006198
THOMAS J. CAPANO,	)	
	)	
Defendant.	)	

BEFORE: HON. WILLIAM SWAIN LEE, J.
and a jury

STATE'S EXHIBIT 147

* * *

[13] Connolly:	Do you own any handguns?
MacIntyre:	I did.
Connolly:	And what type of handgun, well, when did you own a handgun?
MacIntyre:	Uh, probably, I purchased one for self-defense a few years ago. Um, I hate guns. I've never been comfortable with them, but I was uncomfortable where I lived and I didn't, I thought for some reason that I might be able to use it. I have a friend who teaches a course in ga, shooting guns or training and she said she would teach me, and I purchased one and never took it out of the box. And, uh, one day I came home at the end of school and my son was walking around my room just looking in my closet and I got nervous. So I took it apart. I don't even know what it was. It was a little, little gun. And I

took it apart and I threw it away in, uh, separate bags.

* * *

[23] Connolly: Mmm huh. Did you ever fire the gun?

MacIntyre: No.

Connolly: Did the gun remain in your exclusive possession from the time you bought it until the time you threw it away?

MacIntyre: Yes.

Connolly: And you're very certain that nobody else ever handled that gun?

MacIntyre: Yes, except for the man who sold it to me.

Connolly: So nobody else ever touched that . . .

[24] MacIntyre: Nope.

Connolly: . . . gun?

MacIntyre: No, after I threw it away, you know.

Connolly: Did you discuss with Tom Capano your intention to dispose of the gun prior to when you got rid of it?

MacIntyre: No.

Connolly: You're very certain about that?

MacIntyre: Yes.

Connolly: Absolutely certain?

MacIntyre: I am absolutely certain about it.

Connolly: When did you first tell him that you had gotten rid of the gun?

MacIntyre: Probably shortly thereafter. I mean I did it right away. Probably the next day I told him. Say Sunday.

Connolly: And what was his reaction.

MacIntyre: "Good. Update your security system."

Connolly: Are you, and I want to remind you that you're under oath.

MacIntyre: Yes.

Connolly: Are you absolutely certain that Tom Capano never touched that gun?

MacIntyre: Yes. To my best, the best of my knowledge.

Connolly: Did you ever show him the gun?

MacIntyre: No.

[25] Connolly: Did you ever lend him the gun?

MacIntyre: No.

* * *

Supreme Court, U.S.
FILED
FEB 7 2002

(3)

No. 01-724

In The

Supreme Court of the United States

THOMAS J. CAPANO,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Delaware

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN OPPOSITION

The Attorney General of Delaware, on behalf of the State of Delaware, respectfully submits the following in response to the petition for a writ of certiorari to review the judgment of the Delaware Supreme Court in this case.

OPINIONS BELOW

The opinion of the Delaware Supreme Court (Pet. App. A1-A239) is officially reported at 781 A.2d 556.

STATEMENT

In December 1997, a Delaware state grand jury indicted petitioner Thomas J. Capano, charging him with having committed first degree murder in the death of Anne Marie Fahey. After a 10-week trial, a Superior Court jury found petitioner guilty of first degree murder. Following a penalty hearing, the jury recommended by a vote of 10 to 2 that petitioner be sentenced to death. In March 1999, the trial judge sentenced petitioner to death. On appeal, the Delaware Supreme Court affirmed the conviction and the sentence. Pet. App. A1-A239.

1. Petitioner, a prominent local attorney, and Anne Marie Fahey began dating in the spring of 1994. The two kept the relationship a secret from most of their friends and family members. Fahey was in love with petitioner, but she knew that she could not expect to marry him. By September 1995, when Fahey met Michael Scanlon, she was attempting to end the relationship with petitioner.

Petitioner, however, became very upset and continued to pursue the relationship. On her part, Fahey was concerned that petitioner would react badly if he learned of her increasingly close ties to Scanlon, Fahey telling her psychiatrist that she felt petitioner was controlling her. By April 1996, Fahey thought that she and petitioner had established a friendship that she could manage while increasing her involvement with Scanlon. Pet. App. A12-A14, A92-A94, A96-A99.

In the meantime, according to prosecutors, petitioner had started to plan Fahey's demise. In February 1996, petitioner told two of his brothers, Gerry and Joseph, that he had been threatened by extortionists, and he borrowed $8,000 from Gerry in connection with the extortion effort. Petitioner later obtained a pistol from Gerry (which petitioner returned about a month later) and asked Gerry if he could borrow Gerry's boat if he had to dispose of a body. In April 1996, petitioner purchased a 162-quart marine cooler that was later used to dispose of Fahey's body. The following month, petitioner had his mistress of 17 years, Deborah MacIntyre, purchase a handgun for him. Pet. App. A14, A49-A53, A56-A58.

2. On Thursday, June 27, 1996, Fahey left work at about 4:30 p.m. and went to an appointment with her psychiatrist. Petitioner and Fahey later had dinner at a Philadelphia restaurant, and Fahey was never seen alive thereafter. Early the next morning, petitioner asked Gerry if he could borrow his boat. According to Gerry, when he asked petitioner, "Did you do it?", petitioner replied that he had. The two agreed to meet later at petitioner's house. Pet. App. A15.

When Gerry arrived at about 8:30 a.m., petitioner had secured the cooler with a lock and chain which Gerry told him to remove. The two placed the cooler in the back of petitioner's sports utility vehicle, and they drove to Gerry's house in Stone Harbor, New Jersey. There, they put the cooler onto Gerry's boat and proceeded to sea. At about 60 miles from the coast, they pushed the cooler over the side. The cooler, however, simply floated and continued to do so even after Gerry shot a hole in it. Gerry eventually maneuvered the boat alongside the cooler but, after giving petitioner two anchors, turned away as petitioner wrapped Fahey's body in the chain and weighed it down with the anchors. Gerry looked back in time to see part of a human leg sink into the water. He retrieved the cooler from the water, rinsed out the inside, and removed the lid before tossing the cooler and the lid back into the ocean.[1] Back at petitioner's house, the two disposed of a bloodstained love seat and rug from the great room of the house; on Saturday, June 29, petitioner bought a new rug. Pet. App. A15-A16, A47-A48, A59-A60.

That Saturday night, Fahey did not appear at a family dinner, and after contacting some of her friends and entering her apartment, Fahey's family contacted police. Investigators determined that night that petitioner might have information about Fahey's whereabouts and questioned him. Police returned on Sunday afternoon and searched petitioner's house. A subsequent search found small spots of blood on a wall in the great room of the

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[1] The cooler was later found at sea by fisherman off the New Jersey coast. Pet. App. A48.

house. DNA testing of the blood spots, comparing them with blood Fahey had given to a blood bank, showed the spots to be a likely match to Fahey's blood. Federal authorities joined the investigation in the summer of 1996, and several individuals, including petitioner's brothers, appeared before a federal grand jury. In October 1997, federal agents executing a search warrant discovered illegal drugs and weapons in Gerry's house, and the following month, Gerry agreed to cooperate with authorities investigating Fahey's disappearance. Pet. App. A11-A12, A16.

3. Petitioner offered a radically different version of events. Testifying at trial, petitioner recounted that after dinner in Philadelphia, he and Fahey stopped at her apartment and from there went to his house to watch television, arriving shortly after 10:00 p.m. About an hour later, with Fahey still there, he spoke with MacIntyre and told her that she should not come to the house. A few minutes later, as he and Fahey sat in the great room, a very agitated MacIntyre walked into the room. Fahey began to put her pantyhose back on, telling petitioner that she wanted to leave. MacIntyre then produced a pistol and threatened to shoot herself. Petitioner explained that he grabbed MacIntyre's arm to prevent her from doing so, but MacIntyre accidentally fired the gun; the bullet hit Fahey behind her right ear, killing her instantly. Petitioner retrieved the pistol when MacIntyre dropped it, and petitioner sent MacIntyre on her way. He then cleaned up the blood and placed Fahey's body in the cooler. At that point, petitioner related, he went to Fahey's apartment and arranged it so as to appear that Fahey had been there. The next morning, he enlisted

Gerry's help in disposing of Fahey's body off the New Jersey coast. Pet. App. A17-A19.

4. Petitioner was arrested in November 1997, charged with first degree intentional murder,[2] and a state grand jury indicted him the following month. In January 1999, a jury found petitioner guilty as charged, and after a five day penalty hearing, the jury recommended that petitioner be sentenced to death. In March 1999, after considering the recommendation of the jury, the trial judge sentenced petitioner to death. Pet. App. A2-A3.

The Delaware Supreme Court affirmed. Rejecting petitioner's sixteen claims of error, the court decided, *inter alia*, that the trial judge had correctly denied petitioner's request that the jury be instructed on lesser included offenses. State law did not always preclude lesser included offense instructions when the defense was complete innocence,[3] but in petitioner's case, there was no rational basis in the evidence for convicting petitioner of a lesser degree of homicide:

> If the jury rejected the State's planning evidence, concluding, for example, that the cooler and the gun purchases were unrelated to Fahey, it could have returned a verdict acquitting the defendant. But, conviction on any other theory would require pure speculation by the jury concerning the manner of Fahey's death. . . .
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> . . . Although there is evidence of the disposal of Fahey's body, the parties concede that apart from the accident defense offered in Capano's

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[2] Pet. App. D.

[3] Pet. App. A114-A117.

> testimony, there is no evidence concerning the *manner* of Fahey's death. Her body was not recovered and neither was any murder weapon. Putting aside Capano's accident defense, no one gave eyewitness testimony bearing on the circumstances under which Fahey died.

Pet. App. A119-A120 (emphasis in original). And petitioner's account of events did not, under state law, support a finding of recklessness or criminal negligence. Pet. App. A123-A124. Because there was no basis in state law to instruct the jury on lesser included offenses, this Court's decision in *Beck v. Alabama*, 447 U.S. 625 (1980) did not require, as a matter of federal law, otherwise. Pet. App. A125-A127.

Petitioner also contended that the decision of the Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) made his sentence invalid because the jury was not required to find the "facts" that increased the penalty from life imprisonment without parole to death. The state court disagreed, deciding that the rule announced in *Apprendi* was applicable only when the enhanced sentence actually exceeds the statutory maximum term prescribed for the charged offense. But a conviction of first degree murder authorizes the later imposition of the death penalty, this Court in *Jones v. United States*, 526 U.S. 227, 251 (1999), having made the point that " 'the finding of aggravating facts fall[s] within the traditional scope of capital sentencing as a choice between a greater and a lesser penalty, *not as a process of raising the ceiling of the sentencing range available.*' " Pet. App. A213. Because the finding of a statutory aggravating factor did not expose petitioner to a greater penalty than that authorized by the conviction,

Apprendi did not require reversal of the death sentence. Pet. App. A211-A215.

ARGUMENT

A. Constitutionality of Death Penalty Statute

In 1977, the state legislature enacted a capital punishment procedure, patterned after the Georgia statute approved in *Gregg v. Georgia*, 428 U.S. 153 (1976). *See Flamer v. State*, 490 A.2d 104, 121-22 (Del. 1983), *cert. denied*, 464 U.S. 865 (1983) and 474 U.S. 865 (1985). Under the statute, the jury was the sentencing authority, and a death sentence could be imposed only if the jury unanimously (1) found at least one statutory aggravating circumstance beyond a reasonable doubt and (2) recommended death after weighing the aggravating and mitigating evidence. *Flamer v. Delaware*, 68 F.3d 736, 741 (3d Cir. 1995), *cert. denied*, 516 U.S. 1088 (1996).[4]

In October 1991, the state legislature amended the statute, changing the sentencing procedure to one substantially identical to that used in Alabama and Florida.[5] *See generally Harris v. Alabama*, 513 U.S. 504 (1995); *Proffitt v. Florida*, 428 U.S. 242 (1976). Under the 1991 procedure, after the penalty hearing, the jury reports to the trial judge its findings as to the existence of statutory aggravating circumstances. The jury also advises the judge

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[4] Though the statute uses the term "weighing," Delaware is not a "weighing" state. *Flamer*, 68 F.3d at 745-49.

[5] The statute is reproduced in Pet. App. E.

whether, by a preponderance of the evidence, the statutory and non-statutory aggravating circumstances outweigh the mitigating circumstances. In making the report, the jury also discloses its vote on each question. The trial court, after considering the recommendation of the jury, is to decide the same questions. If the court concludes that the answer to both questions is in the affirmative, it must impose a sentence of death; otherwise, it must impose a sentence of life imprisonment without parole. *See Hameen v. State of Delaware*, 212 F.3d 226, 243-46 (3d Cir. 2000), *cert. denied*, 121 S. Ct. 1365 (2001); *Wright v. State*, 633 A.2d 329, 335 (Del. 1993).

Petitioner contends that under this procedure, his death sentence was imposed in violation of this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the Court held that, as a matter of constitutional law, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. According to petitioner, the Delaware procedure improperly removes from the jury the determination of facts that increase the range of penalties to which a murder defendant is exposed. Pet. at 9-21. In *Ring v. Arizona*, *cert. granted*, 122 S. Ct. 865 (2002) (No. 01-488), this Court granted certiorari to decide whether *Walton v. Arizona*, 497 U.S. 639 (1990), approving a sentencing procedure similar in nature to that employed in Delaware, should be overruled in light of *Apprendi*. Accordingly, the Court should hold the petition in this case pending the decision in *Ring* and dispose of the petition as appropriate in light of that decision.

B. Lesser Included Offense Instructions

According to petitioner, the evidence warranted instructing the jury on several lesser included offenses, and he so asked the judge.[6] Beca ise the trial judge denied the defense request, petitioner a gued on appeal that his conviction was invalid under thi Court's decision in *Beck v. Alabama*, 447 U.S. 625 (1980). The Delaware Supreme Court correctly rejected that ar ument, and its decision does not conflict with any decisi on of this Court. Accordingly, further review is not wa ranted.

a. In *Beck*, the Court hel that a death sentence cannot be imposed after a jury v erdict of guilt of a capital offense, when the jury was no allowed to consider a lesser included non-capital offe nse and when the evidence would have supported su ch a verdict. 447 U.S. at 627, 642, 645. Two years later, the Court reiterated in *Hopper v. Evans*, 456 U.S. 605 (19 82), that lesser included instructions were only mandated when supported by the evidence. Conversely, if there is no lesser included offense, as the greater and lesse offenses are defined in state law, the defendant has no constitutional entitlement to a lesser included instruction. *Hopkins v. Reeves*, 524 U.S. 88 (1998); *Spaziano v. Florida*, 46 8 U.S. 447 (1984).

b. Petitioner does not sug gest that the Delaware court applied an incorrect lega l standard. Indeed, the standard for determining whe ther the jury must be

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[6] At one point, however, peti tioner had instructed his attorneys not to request any lesser included offense instructions. Tr. 17 (Jan. 7, 1999).

instructed as to a lesser included offense under Delaware law is identical to that employed by the federal courts. *Compare Keeble v. United States*, 412 U.S. 205, 208 (1973) *with Ward v. State*, 575 A.2d 1156, 1158-59 (Del. 1990) and Del. Code Ann. tit. 11, § 206(c) (Repl. 2001) ("The court is not obligated to charge the jury with respect to an included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense."). *See Hopper*, 456 U.S. at 611-12 (noting parallel between Alabama state law and federal standard). His complaint is that the court undervalued the evidence presented to the jury, and that evidence, which could have created a reasonable doubt as to the commission of the charged offense, was enough to require a lesser included instruction. Pet. at 25. Petitioner however simply conflates the two parts of the rule: it cannot be enough that the jury could acquit the defendant of the greater offense for, on that theory, every defendant would be entitled to a lesser included instruction. Instead, the defendant must "come forward with some evidence if he wishes to have the benefit of a lesser included offense instruction; while a judge cannot prevent a jury from rejecting the prosecution's entire case, he is not obligated to assist a jury in coming to an irrational conclusion of partial acceptance and partial rejection of the prosecution's case by giving a lesser-included offense instruction." *United States v. Cady*, 495 F.2d 742, 748 (8th Cir. 1974) (citing *Driscoll v. United States*, 356 F.2d 324, 327 (1st Cir. 1966), *vacated on other grounds sub nom. Piccioli v. United States*, 390 U.S. 202 (1968)). *See United States v. Moore*, 108 F.3d 270, 274 (10th Cir. 1997); *State v. Fowler*,

114 Wash. 2d 59, 67-68, 785 P.2d 808, 813-14 (1990). And the amount of evidence must be greater than a scintilla; the evidence must be sufficient to convict the defendant of the lesser offense. *Cf. Mathews v. United States*, 485 U.S. 58, 63 (1988) (entrapment); *United States v. Branch*, 91 F.3d 699, 712-13 (5th Cir. 1996), *cert. denied*, 520 U.S. 1185 (1997) (self-defense). Petitioner's jury could easily have discounted the prosecution's evidence that he caused Fahey's death intentionally, but there was no evidence from which the jury could reasonably decide that petitioner had acted in either a reckless or criminally negligent manner. Petitioner's contention otherwise is little more than a request that this Court undertake its own review of the exhaustive trial record, a request that is singularly inappropriate for the Court's exercise of its certiorari jurisdiction. *Yee v. City of Escondido*, 503 U.S. 519, 536 (1992); *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176 n.8 (1981); *Rudolph v. United States*, 370 U.S. 269, 270 (1962). *See Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985). Further consideration of the question is thus unwarranted.

CONCLUSION

The petition for a writ of certiorari should be held, for purposes of the first question presented, pending the decision in *Ring v. Arizona* and disposed of as appropriate in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

THOMAS J. CAPANO,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Delaware

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

1. CONSTITUTIONALITY OF DELAWARE DEATH PENALTY STATUTE

On January 11, 2002, the Court granted the Petition for Certiorari in *Ring v. Arizona*, ___ U.S. ___, 122 S.Ct. 865, 151 L.Ed.2d 738 (2002). In its Brief, the State of Delaware ("State") conceded that Delaware's statutory scheme for imposition of the death penalty is "similar in nature" to the Arizona scheme which is at issue in *Ring*. (Brief in Opposition at 8). Nonetheless, the State suggests, instead of consolidating this case with *Ring*, that this Court "should hold the petition in this case pending the decision in *Ring*. . . . " (*Id.*). In response, Petitioner suggests that his Petition be granted and that the matter be consolidated, for briefing and argument, with *Ring*.

II. ENTITLEMENT TO LESSER INCLUDED OFFENSE INSTRUCTIONS UNDER THE DUE PROCESS CLAUSE

In its Brief, the State argues that the Petition for Writ of Certiorari ("Petition") should be denied because Petitioner's argument is "little more than a request that this Court undertake its own review of the exhaustive trial record, a request that is singularly inappropriate for the Court's exercise of its certiorari jurisdiction." (Brief in Opposition at 11). The State's claim that granting the Petition will inevitably immerse the Court in a *de novo* review of the evidence is simply incorrect. In fact, the points made by the State in its Brief actually serve to emphasize the real issue presented in the Petition; namely, that the Court should grant the Petition to decide just what kind of evidence will be deemed sufficient under *Beck v. Alabama*, 447 U.S. 625 (1980) to entitle a

defendant who is charged with capital murder to have the jury instructed on lesser included offenses.

The State argues that Petitioner has no complaint (other than seeking a review of the evidence itself) that the Delaware Supreme Court applied an "incorrect legal standard" in deciding whether the jury should be instructed as to lesser included offenses. The State claims that the legal standard in Delaware[1] is "identical to that employed by the federal courts." (Brief in Opposition at 9-10). That statement is not necessarily correct because the Court has not been entirely consistent in its formulation of the legal standard for entitlement to lesser offenses. *See, Sansone v. United States,* 380 U.S. 343, 350 (1965) ("A lesser included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense"); *compare, Keeble v. United States,* 412 U.S. 205, 208 (1973) ("A defendant is entitled to a lesser included offense instruction only if the evidence would permit a jury rationally to find the defendant guilty of the lesser included offense and acquit him or her of the greater offense"). In *Beck,* the Court noted that while the "States vary in their descriptions of the quantum of proof necessary to give rise to a right to a lesser included offense instruction, **they agree that it must be given when supported by the evidence**") (emphasis added). *Id.,* 447 U.S. at 636 & n. 12.

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[1] See, 11 *Del.C.* § 206(c) (Repl. 2001) (Lesser included offense instruction not required unless "there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense").

State court formulations of what evidence will "count" for purposes of entitlement to lesser included offense instructions are widely divergent. In *People v. Novak*, 643 N.E.2d 762, 770 (Ill. 1994), the court adopted *Sansone's* "disputed factual element" test and stated that even "where the testimony is not conflicting, this requirement may be satisfied if the conclusion as to the lesser offense may fairly be inferred from the evidence presented." *Id.* The court also stated that the quantum of evidence required may be "any," "some," "slight," or "very slight." *Id.* In *State v. Sivri*, 646 A.2d 169, 181 (Conn. 1994), the court also employed *Sansone's* "disputed factual element" test. In reversing the defendant's conviction for intentional murder, the court noted that "the critical element distinguishing murder from its lesser included offenses is intent . . . the most elusive element of the crime charged." *Id.* at 182. The court held that "if the evidence suggests at least a possibility that the defendant acted with a lesser intent than that of the specific intent to kill . . . then the defendant was entitled to lesser included offense instructions." *Id.* In *State v. Santillan*, 948 S.W.2d 574, 576 (Mo. 1997) (*en banc*), the court stated:

> The [Missouri statute][2] requires only that there be a basis for the jury to acquit on the higher offense in order for the court to submit an instruction for the lesser included offense. If a reasonable juror could draw inferences from the evidence presented that the defendant did not deliberate, the trial court should instruct down. **The defendant is not required to put on affirmative evidence as to lack of deliberation to**

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[2] V.A.M.S. § 556.046.2.

> **obtain submission of a second degree murder instruction** (emphasis added).

In *Willett v. State*, 836 P.2d 955, 958 (Alaska App. 1992), the court described the "some evidence" test as follows:

> In order to satisfy the "some evidence" test, it is not necessary that the defendant testify or even offer direct evidence in his own behalf. Some evidence establishing a dispute as to a factual issue may arise from weakness in the prosecution's evidence or from impeachment of its witnesses. Similarly, circumstantial evidence presented as part of the state's case-in-chief may give rise to some evidence of a disputed fact.

At the opposite end of the spectrum is *Skinner v. State*, 956 S.W. 2d 532, 543 (Tex.Cr.App. 1997), where the court held:

> Some evidence must exist in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense. It is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense. Rather, there must be some evidence directly germane to a lesser included offense for the factfinder to consider before an instruction on a lesser included offense is warranted.

Finally, it should be noted that the rationale of the Delaware Supreme Court for rejecting Petitioner's argument that "reasonable doubt" evidence entitled him to lesser included offense instructions closely parallels the holding of the Texas court in *Skinner* and is in contradiction to the other decisions cited above. *See*, Pet. App. A118-A121. As the above cited decisions illustrate, the entitlement to lesser included offense instructions under the Due Process Clause, recognized in *Beck*, varies according to geography. In the absence of a standard which

clearly defines and makes uniform the "some evidence" test recognized in *Beck*, then *Beck* itself is reduced to the proposition that a capital defendant is entitled to instructions only on those lesser included offenses to which state law says he is entitled. If that were the case, then *Beck* itself is rendered meaningless.

CONCLUSION

For the reasons set forth herein and in the Petition for Certiorari, the Court should grant the Writ as to both questions presented and consolidate the first question with the pending appeal in *Ring v. Arizona*.

Respectfully, submitted,

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